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No. .....

IN THE

Supreme Court of the United States

October Term, 1980.

CALIFORNIA MANUFACTURERS ASSOCIATION, *et al.*,
Appellants,

vs.

INDUSTRIAL WELFARE COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

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Questions Presented.

Two questions are before this Court.

(1) Are the California Industrial Welfare Commission's Orders 1-80, 3-80, 4-80, 8-80, 9-80 and 10-80 preempted, in part or in whole, by the National Labor Relations Act, 29 U.S.C. section 151 *et seq.* and the Railway Labor Act, 45 U.S.C. section 151, *et seq.*?

(2) Did the California Supreme Court deny procedural due process to appellants by denying them the right to an evidentiary hearing and the right to present and develop evidence on all issues, including the federal preemption issue?

Parties to Appeal.

Appellants are: The California Manufacturers Association; United Air Lines, Inc.; American Airlines, Inc.; Sierra Ski Area Association; California Trucking Association; Theatre Association of California; Theatre Properties, Inc.; Hitchcock Transportation Co. and Corcoran Motor Transport, Inc.

Appellees are: The Industrial Welfare Commission and the Division of Labor Standards Enforcement of the State of California.

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OPINION BELOW.

The opinion of the Supreme Court of California, reported at 27 Cal.3d 690 (1980), appears as Appendix A hereto. There are no lower court decisions.

JURISDICTION.

The judgment of the Supreme Court of California was entered on July 10, 1980. It was modified on August 28, 1980 to allow for recovery of costs by appellees. The effect of the modification was to move forward to August 28, 1980 the date of entry of judgment. Motions by appellants for rehearing and stay orders were denied on August 28, 1980.

Notices of appeal to this Court were duly filed in the Supreme Court of California on August 4 and 5, 1980. (Appendix B) An amended notice of appeal was filed on September 3, 1980 because of the August 28 modification of the judgment. (Appendix C)

This appeal is being docketed in this Court within ninety days from the date of entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2). The Court has jurisdiction to review the constitutional due process questions presented in this case under the rule in *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944) and *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

CONSTITUTIONAL PROVISIONS AND REGULATIONS.

Article VI, United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; . . . .

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty or property without due process of law; . . . .

The California Industrial Welfare Commission Orders 1-80, 3-80, 4-80, 8-80, 9-80 and 10-80 are too voluminous to quote here; they are codified in Title 8, California Administrative Code, section 11000 *et seq.* and are reproduced in Appendix D.

STATEMENT OF THE CASE.

The California Industrial Welfare Commission ("Commission") is a five person, quasi-legislative agency of the State of California. It has the authority, under Section 1182 of the California Labor Code, to promulgate wage orders which purport to establish a minimum wage and to regulate overtime hours and other terms and conditions of employment for all employees in the State of California. The orders include, *inter alia,* provisions relating to reporting time pay, record keeping requirements, cash shortages and breakage, uniform and equipment allowances, meals and lodging, meal periods, rest periods, change room and resting facilities, seats, temperature controls, and elevators.

There are 15 separate wage orders. Twelve prescribe working conditions in twelve broadly defined "industries"; three regulate conditions of employment in certain specified occupations.[1] Historically, the orders applied only to women

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[1]The California Manufacturers Association and its members are covered by Wage Orders Nos. 1-80 (Manufacturing Industry), 3-80 (Canning, Freezing and Preserving Industry), 4-80 (Professional, Technical, Clerical, Mechanical and Similar Occupations), 8-80 (Industries Handling Products After Harvest). The California Trucking Association and its members, United Air Lines, Inc., American Airlines, Inc., Hitchcock Transportation Co. and Corcoran Motor Transport, are covered by Wage Order 9-80 (Transportation Industry). Sierra Ski Areas Association and its members, Theatre Association of California and its members, and Theatre Properties, Inc., are covered by Wage Order 10-80 (Amusement and Recreation Industry).

and minors. Since 1972 the Commission has attempted to promulgate orders regulating industries and occupations predominantly employing males, but has been unsuccessful because of various court challenges rendering the orders invalid.[2] If the 1980 orders are ultimately found valid, they will be the *first* orders to apply to all employees. The effect which a totally new set of regulations will have upon industries numerically dominated by male employment, in which customs, practices and collective bargaining relationships have evolved for fifty years unimpeded by the orders of the Industrial Welfare Commission, is catastrophic.

In September 1979, the Commission promulgated 15 new wage orders which were scheduled to become effective on January 1, 1980. In December 1979, in four separate California superior courts, various employer associations and employers filed petitions for writs of mandate challenging the impending 1980 orders.[3] They did so on a variety of

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[2]In the early 1970's all then existing wage orders, being in the nature of women's protective statutes, were declared invalid in a series of federal cases on the ground that, since they applied only to women, they conflicted with and were therefore preempted by various federal civil rights laws. *See, e.g., Homemakers, Inc. v. IWC*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976). All 15 of the Industrial Welfare Commission's 1973 Wage Orders were stayed *ab initio* and declared invalid in 1975, in that instance, as the result of a challenge levied by organized labor. *Henning v. IWC*, 22 Wage Hour Cases 25 (1975). In 1976 the Commission issued new wage orders which again were successfully challenged. *California Hotel and Motel Association v. Industrial Welfare Commission*, 25 Cal.3d 200 (1979). None of the 1976 counterparts to the wage orders here challenged have ever been fully enforced. See *Hitchcock Transportation Co., et al. v. Industrial Welfare Commission*, 27 Cal.3d 736 (1980).

[3]*California Manufacturers Association v. Industrial Welfare Commission, et al.* (Orange County Superior Court No. 325866); *California Trucking Ass'n et al. v. Industrial Welfare Commission, et al.* (Kings County Superior Court No. 31321); *Western Growers Ass'n., et al. v. Industrial Welfare Commission, et al.* (Kern County Superior Court No. 164537); *San Joaquin Nisei Farmers League, et al. v. Industrial Welfare Commission* (Stanislaus County Superior Court No. 164580).

grounds, most of which centered on the Commission's failure to comply with certain provisions of the California Labor Code specifying the procedures for promulgation of the regulations. Because employer groups concluded that the preemption issue was exclusively a federal question and should be raised, as it has been, in a federal court action, a decision was made not to raise it in the state court litigation.[4]

In three of the actions, superior courts issued orders staying in whole or in part the implementation and enforcement of the challenged wage orders and alternative writs of mandate ordering the Commission to show cause on dates certain.[5] On February 25, 1980 before any evidentiary hearing could be held in any of the four actions, the Commission filed an original petition for a peremptory writ of mandate in the California Supreme Court, challenging the discretion of the superior courts to issue the stay orders and asking the California Supreme Court to dispose of the cases on their merits.

On April 1, 1980, the California Supreme Court, over appellants' written opposition, issued an alternative writ of mandate directing that all proceedings in the superior courts cease and that the four actions, in effect, be consolidated and transferred to the Supreme Court. No factual record had been developed below and pretrial discovery had barely commenced when the court took up the cases. Indeed, appellants were in the midst of taking the depositions of four

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[4]This issue, in conjunction with other constitutional issues, is pending before the United States District Court for the Northern District of California in an action entitled *California Manufacturers Association, et al. v. Industrial Welfare Commission, et al.* (Civil No. C-80-2644 WHO).

[5]In the case of *Western Growers Ass'n et al., supra*, n. 3, there was no need for the Court to issue a stay order because the Commission stipulated *ab initio* to the stay order.

of the principal actors in the promulgation of the orders when the California Supreme Court's alternative writ came down; appellants were never allowed to complete the depositions. On the assumption that the Supreme Court was aware neither of the status of discovery nor of the lack of any factual record below, appellants filed, on April 13, 1980 a motion to allow discovery and for reference to a special master for the taking of evidence and resolution of all factual issues.[6]

All motions were denied summarily on April 22, 1980 without comment.

Simultaneously, and only fifteen days before the time set for oral argument (held on May 7, 1980), the court notified all counsel of the issues it wished them to address at argument. One of those issues, raised *sua sponte* by the court, was:

> Is the IWC precluded by federal or state labor relations statutes from regulating with respect to matters that are subject to collective bargaining?

(*See*, letter to all counsel dated April 21, 1980, in Appendix F hereto.)

On April 25, 1980, in response to the court's inquiry concerning federal labor law preemption and in response to appellees' unsolicited brief on this issue, appellants filed a brief with the court objecting on due process grounds to the court's assumption of this critically important and highly

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[6]Appellants also moved to dismiss the Supreme Court action on jurisdictional grounds. Appellants had every right to suppose that they would have an opportunity to make a factual record. In the case which originated in Orange County, the California Manufacturers Association had entered into a stipulated stay order with the IWC, which order specifically provided for a trial on the merits. *See*, Stipulation and Order contained in Appendix E hereto.

complex issue without a factual record.[7] The objection was stated in the opening page of appellants' brief:

> The major difficulty with addressing [the federal labor law preemption question] at this point in these proceedings is that no factual record has been developed. To the extent that the Court wishes to rule upon these issues in the present case, it will be doing so in a vacuum. . . .
>
> • • •
>
> The Real Parties in Interest [Appellants] hereby object to the Court's taking up this issue on the ground that it deprives them of their right to due process, in that it denies them the right to a hearing and the orderly development and presentation of evidence.

Attached hereto as Appendix G is the first page of appellants' April 25, 1980 brief. This objection was repeated both during and after oral argument. (*See*, letter dated May 8, 1980 to Acting Chief Justice Tobriner; Appendix H.) The California Supreme Court considered these due process objections and expressly overruled them (27 Cal.3d 699, n. 3, and 725-726, n. 14). On July 10, 1980 the Supreme Court handed down a unanimous opinion declaring the wage orders valid despite the doctrine of federal preemption (27 Cal.3d 725-729).

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[7]It is not completely informative for the court to say, as it does, that "both sides have filed briefs." (27 Cal.3d 725-726, n. 14.) The fact is that, because of the shortness of time and the total absence of a record, the "briefs" were nothing more than an accumulation of written arguments filed by the parties in earlier litigation involving the 1976 wage orders of the Commission. Appellants found themselves between Scylla and Charybdis; they could either ignore the "brief" filed by appellees or, in a purely defensive move, respond in kind. They chose the latter course, taking care first to state their due process objection.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents, probably in the most classic sense, a matter of far-reaching precedential value because of the context in which the preemption issue arises. The 1980 Industrial Welfare Commission orders seek to override and supersede some of the most significant provisions in standard collective bargaining agreements. Not only do the orders affect local labor agreements entered into by some of the appellants and their employees, they render ineffectual historical, painstakingly wrought clauses in national labor contracts negotiated by such entities as Kaiser Steel Corporation, McDonnell Douglas Corporation, United States Steel Corporation, Bethlehem Steel Corporation, Aluminum Company of America, Union Oil Company of California (members of the California Manufacturers Association), United Air Lines, American Airlines and many members of the California Trucking Association. The California Supreme Court's almost presumptuous disposition of so critical a federal issue without giving the appellants the opportunity to submit evidence is an egregious denial of fundamental procedural due process.

A. Preemption by the National Labor Relations Act.

A case which raises the preemption question under the National Labor Relations Act undoubtedly affords this Court a wide range of judicial alternatives. Witness, for example, *New York Tel. Co., et al. v. New York State Dept. of Labor, et al.*, 440 U.S. 519, 59 L.Ed.2d 553, 99 S.Ct. 1328 (1979), the Court's most recent explication, in which four separate viewpoints were advanced.

Collectively analyzed, however, *New York Tel. Co., supra*, and the important preemption cases of the past two decades, *Teamsters v. Oliver*, 358 U.S. 283, 3 L.Ed.2d 312, 79 S.Ct. 297 (1958); *San Diego Bldg. Trades Council*

v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959); *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al.*, 427 U.S. 132, 153, 49 L.Ed.2d 396, 96 S.Ct. 2548 (1976); *Farmer v. Carpenters, et al.*, 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056 (1977); and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 56 L.Ed.2d 209, 98 S.Ct. 1745 (1978); all express the central theory advanced by Justice Powell in his dissent in *New York Tel. Co., supra:*

> Free collective bargaining is the cornerstone of the structure of labor management relations carefully designed by Congress when it enacted the NLRA. . . .
>
> What Congress left unregulated is as important as the regulations that it imposed. It sought to leave labor and management essentially free to bargain for an agreement to govern their relationship.

440 U.S. 519, 552, 59 L.Ed.2d 553, 576.

At the heart of the National Labor Relations Act is section 7 which specifically provides that employees have the right to organize collectively, to designate representatives of their own choosing, to negotiate terms and conditions of their employment and to engage in concerted activity. Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972). The doctrine of federal labor law preemption, first enunciated in *Hill v. Florida*, 325 U.S. 538 (1945), has continued to develop over the past thirty years. The central tenet of the doctrine is that a forum must be provided in which parties may contend on even footing, free of unwarranted state influences.

> State attempts to influence the substantive terms of collective bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB. . . .

Lodge 76, *supra*, 427 U.S. at 153.

> [T]here is no room in this [federal regulatory] scheme for the application . . . of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States.

Teamsters v. Oliver, 358 U.S. at 296.

This case presents squarely the most dramatic example to reach this Court in 20 years of a state's attempt to regulate and set terms and conditions of employment, which up to now, have been left by the Congress for the exclusive consideration and resolution by the collective bargaining process. It is not simply another attempt by a state to regulate matters "arguably protected or prohibited" by the Act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959). Rather, it is a straightforward effort by the State of California to impose inflexible legal standards for such mandatory subjects of collective bargaining as meal periods, rest periods, lunch breaks, cash shortages and breakage, change room facilities, rest room facilities, reporting time pay, uniforms, tool allowances, etc., all of which are major bargained for items of virtually every labor contract.

The matters which the orders seek to control are not concerns that are so "deeply rooted in local feeling and responsibility," that the states are left with the power to act.[8] *San Diego Bldg. Trades Council v. Garmon, supra,*

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[8]Indeed, there actually are no roots at all. Recall that until 1973 there was no effort by the state to include adult males within the coverage of the wage orders.

359 U.S. at 244, 3 L.Ed.2d at 782. *See, e.g., Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 2 L.Ed.2d 151, 78 S.Ct. 206 (1957) (violence); *Linn v. Plant Guard Workers*, 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966) (libel); *Farmer v. Carpenters, supra* (intentional infliction of emotional distress). Nor are these matters merely "peripheral concerns" of the Labor Act. *Lodge 76, Machinists v. Wisconsin Employee Relations Commission, supra*, 427 U.S. at 137, 49 L.Ed.2d at 401; *see, e.g., Machinists v. Gonzales*, 356 U.S. 617, 2 L.Ed.2d 1018, 78 S.Ct. 923 (1958). Neither is this a case involving a federal/state benefit program specifically sanctioned by legislative history and congressional intent. *New York Tel. Co., supra, see, e.g., Malone v. White Motor Corp.*, 435 U.S. 497, 504-505, 55 L.Ed.2d 443, 451, 98 S.Ct. 1185.

These regulations, in contrast, intrude deeply into the very core of section 7. In operation, they not only purport to supersede and render void clauses in existing labor agreements, they impede and actually prohibit the very process of negotiation. Consider, for example, that each order requires that all employees be given a duty free lunch period of at least 30 minutes. (*See* section 11 of each wage order.) It is impossible for an employer and a union, in the face of this proscription, to agree to a twenty minute paid lunch, or two twenty minute breaks but no lunch, or any other configuration consistent with the economic realities which the parties mutually may agree make more sense.

Consider also those provisions of the wage orders that require employers to pay for and maintain uniforms and equipment. (*See* section 9 of each order.) This requirement virtually eliminates the ability and incentive of the negotiating parties to make one of the fundamental trade-offs inherent in the bargaining process, i.e., a higher wage in lieu of a uniform or tool allowance.

What the State of California has done through these wage orders is to insinuate itself as a third party participant in collective bargaining. Not only does this smother the "free atmosphere" created by the NLRA, it brings an Orwellian flavor to the table. The state, not the parties, hereafter will decide what is best.

> An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes *that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests*. [Emphasis added].

Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1337-1338, 1352 (1972).

Collective bargaining, as we have known it for the past half century, cannot survive this kind of intrusion.

B. Preemption by Railway Labor Act.

Section 151(a) of the Railway Labor Act echoes the purposes and intent of the National Labor Relations Act:

> It is one of the purposes of the Act 'to forbid any limitation upon freedom of association among employees . . . to provide for the complete independence of carriers and of employees in the matter of self-organization. . . .'

Section 152, Fourth, is the equivalent of section 7 of the National Labor Relations Act:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

The decision of the California Supreme Court also conflicts directly with the policies and pronouncements of this Court in connection with Railway Labor Act matters, insofar as it allows the wage orders to supersede conflicting provisions of collective bargaining agreements entered into pursuant to the Railway Labor Act, 45 U.S.C. §152(4). *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 (1956) and *California v. Taylor*, 353 U.S. 553, 559-60 (1957). This Court has said, "a union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State." *Railway Employees' Dept. v. Hanson*, 351 U.S. at 232.

Even where there is no collective bargaining agreement, the decision of the California Supreme Court still directly conflicts with the rationale of *California v. Taylor*, 353 U.S. 553, 567-568 (1957), by allowing the wage orders to interfere with and supersede a uniform system of national labor relations policies which this Court has recognized are established in order to "[e]liminate inequities and . . . promote a desirable mobility within the . . . labor force." 353 U.S. at 567. The pressing need for uniformity of labor relations for employees and employers covered by the Railway Labor Act is evident from the nature of the jobs which require employees routinely to move from one state to another. 353 U.S. at 567-568, n. 15. The wage orders, by altering these policies for California employees, directly conflict with this principle of uniformity and wreck havoc on employers such as United Air Lines or American Airlines, and many members of the California Trucking Association whose labor agreements are national, even international, in scope.

C. Due Process.

The substantive content of the due process clause of the Fourteenth Amendment goes beyond the specific provisions of the Bill of Rights and embodies a concept of "fundamental justice". *Shields v. Beto*, 370 F.2d 1003, 1004 (5th Cir. 1967). Fundamental justice embraces the notion of ordered liberty, *Sotto v. Wainwright*, 601 F.2d 184, 191 (5th Cir. 1979) and includes the right of access to the courts. In this case, the fundamental ingredient missing was the "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L.Ed.2d 18, 32, 96 S.Ct. 893, 902 (1976). Appellants realize that the process which is "due" is flexible and must be tailored to the particular situation. *Ong v. Tovey*, 552 F.2d 305 (9th Cir. 1977). But in this circumstance, at the very least, the appellants should have been given the opportunity to litigate questions the court chose to consider *sua sponte*, through an evidentiary hearing or the appointment of a master who could make factual determinations.[9] Certainly, this is true as to issues framed by the pleadings.

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[9]All the actions filed by appellants in the superior courts, as well as the proceedings commenced by the Industrial Welfare Commission in the California Supreme Court, were initiated by petitions for writs of mandate pursuant to section 1085 of the California Code of Civil Procedure. Proceedings under section 1085, *et seq.* are specifically designed to allow the introduction of evidence. Indeed, Section 1090, a companion section of the Code, provides that a jury trial may be requested and conducted. When issues of fact are raised in a mandamus proceeding, the hearing is conducted as a regular trial pursuant to ordinary civil action rules, with parties given the right to call witnesses, elicit testimony and produce evidence. Cal. Code of Civil Proc. sections 1090-1091; *see, Lassen v. Alameda*, 150 Cal.App.2d 44, 309 P.2d 520 (1957). Evidence is not limited to the record of the respondent tribunal, but is limited only by the issues raised by the petition and the return. *Finkel v. Superior Court*, 71 Cal.App. 97, 103 (1925).

> Due process mandates that a judicial proceeding give the affected parties an opportunity to be heard on the allegations asserted in the complaint and to present evidence and argument on the contested facts and legal issues framed by the answer to the complaint. Before a district court adjudges, it must determine the facts for itself on the basis of the proffered evidence. . . . In short, a court can only render a judgment after the parties have been afforded a full and fair trial on the claims properly before the court.

Thompson v. Madison County Board of Education, 476 F.2d 676, 678 (5th Cir. 1973). *A fortiori* where the court raises the issue *sua sponte*.

Preemption is not a pure legal question. The collective bargaining agreement should be before the court, affidavits or testimony should point to the conflicts between the labor agreement and the orders (whether by language or practice), there should be evidence of the economic impact which a change in the agreement would produce, and there should be a factual showing of the effect of the regulations on the ability of the parties to continue meaningful negotiations. Only then can a court realistically decide whether the challenged regulations interfere impermissibly with the collective bargaining process.

In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-286 (1971), a federal labor law preemption case, this Court noted:

> The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. A full understanding of the particular preemption rule set forth in *Garmon* especially requires, we think, appre-

> ciation of the *precise nature* and *extent* of the potential for injurious conflict. . . . [Emphasis added].

In *Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964), another federal labor law preemption case, this Court noted:

> The basic question, in other words, is whether '*in a case such as this*, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102. The answer to that question ultimately depends upon whether the application of state law *in this kind of case* would operate to frustrate the purpose of the federal legislation.

The essence of the due process clause is that "every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial. . . ." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). The Court has left no doubt that, in situations like the present, due process requires that close attention be paid to questions of fact. *Goldberg v. Kelly*, 397 U.S. 254, 269, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970); cf. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In setting the standard by which courts should measure the adequacy of due process provided in particular cases, the Court stated in *Goldberg, supra*, that:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.

Goldberg, supra, 397 U.S. 254, 262-263 (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

It was contended below that some 8 million employees are affected by the Commission's orders. The California Manufacturers Association alone has over 1200 members employing some [5 million] workers in California. The operations of United Air Lines and American Airlines are at least national in scope. The California Trucking Association counts among its members some of this nation's largest over-the-road haulers of goods. Existing collective bargaining relationships pervade the workforces of all these parties. No one disputes that this matter is of enormous significance and impact. Yet just when careful adherence to concepts of "ordered liberty" and the observance of fundamental first principles of due process such as the basic right to a hearing and to present evidence were needed most, the California court substituted short shrift and myopic judicial notice.

To employers in the State of California whose entire history of employment and compensation practices is about to be stood on its head, the loss is, quite aside from the incalculable monetary cost, grievous indeed.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal.

DATED: October 6, 1980.

Respectfully submitted,
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APPENDIX A.

Opinion.

[S.F. No. 24123. July 10, 1980.]

Industrial Welfare Commission et al., Petitioners, v. The Superior Court of Kern County et al., Respondents; California Hotel and Motel Association et al., Real Parties in Interest.

Summary

By an original petition in the Supreme Court, the Attorney General, on behalf of the Industrial Welfare Commission, sought a writ of mandate or prohibition providing a prompt and definitive resolution of numerous common legal issues raised in various trial court challenges by employers to industry-wide wage orders adopted by the commission. Several of the trial courts had issued stay orders having the practical effect of enjoining the operation of the administrative regulations promulgated pursuant to the commission's quasi-legislative authority.

The Supreme Court ordered issuance of a peremptory writ of mandate directing the trial courts to vacate the orders previously issued staying the operation and effect of the challenged wage orders and to enter judgment in favor of the commission in each of the underlying mandate actions. Preliminarily, the court held that, in view of the large number of affected employees, the tortuous litigation history which had prevented implementation of the majority of the commission's wage orders in recent years, and the effect of the stay orders, the matter was properly before it. The court held that the commission had properly complied with the requirement of Lab. Code, § 1178, that it investigate and find that wages paid employees were inadequate or that hours or conditions of labor were prejudicial to the health,

morals, or welfare of employees, before appointing wage boards to consider such matters, and that it had adequately complied with the requirement of Lab. Code, § 1177, that each wage order include a statement as to its basis. The court rejected a claim of invalidity of the orders by reason of the commission's alleged failure to comply with the requirements of the Environmental Quality Act relating to preparation of an environmental impact report or a negative declaration, as clearly without merit. Rejecting a contention that the commission's orders were null and void insofar as they dealt with matters generally relating to the health and safety of employees, in that the California Occupational Safety and Health Standards Board (Cal/OSHA) has exclusive jurisdiction in the field, the court held that the provision of Lab. Code, § 1173, that, in cases of overlapping jurisdiction, Cal/OSHA shall have "exclusive jurisdiction, and rules, regulations, or policies of the commission on the same subject have no force or effect," is properly interpreted as permitting the commission to regulate working conditions related to health and safety in the absence of any actual conflict with existing Cal/OSHA regulations or policy. The court further held that neither federal nor state labor relation legislation precludes the commission from establishing minimum wages, maximum hours or standard conditions of employment to protect the health and welfare of employees. Taking up individual challenges to specific provisions by certain employers, the court held that, in enacting a wage order relating to the public housekeeping industry, the commission did not abuse its discretion in refusing to provide a lower minimum wage for tipped employees, that agricultural wage orders did not violate due process or impose "undue hardship," and that the commission acted within its authority in adopting a more restrictive provision with respect to the work week of agricultural laborers than that

provided by general statutes on the subject. (Opinion by Tobriner, Acting C. J., with Clark, Richardson, Manuel and Newman, JJ., Taylor, J.,* and Racanelli, J.* concurring.)

Counsel

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No appearance for Respondent.

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Opinion

TOBRINER, Acting C. J.—On September 7, 1979, the California Industrial Welfare Commission (hereafter IWC or commission), acting pursuant to its constitutionally and statutorily based authority (Cal. Const., art. XIV, § 1; Lab.

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*Assigned by the Chairperson of the Judicial Council.

Code, §§ 70-74, 1171-1204),[1] adopted a series of industry-wide "wage orders," prescribing the minimum wages, maximum hours, and standard conditions of employment for employees in this state. These orders (hereafter 1980 wage orders) were scheduled to go into effect on January 1, 1980. In mid-December 1979, however, shortly before the effective date of the orders, numerous employer associations and individual employers (hereafter employers), representing companies which employ millions of California workers, initiated four separate mandate actions in various superior courts throughout the state, challenging the validity of nine of the 1980 wage orders on various grounds.[2] In each of the cases, an alternative writ of mandate issued, along with an order staying each of the nine challenged wage orders in whole or in part.

In a significant number of respects, the December 1979 lawsuits were sequels to similar litigation that had been brought by many of the same organizations and employers several years earlier challenging the 1976 orders adopted by the IWC. In the earlier round of litigation, various courts throughout the state had reached differing conclusions with

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[1]Unless otherwise indicated, all statutory references are to the Labor Code

[2]The four actions, and the respective wage orders challenged therein, are: (1) Western Growers Assn. et al. v. IWC (Kern County Super. Ct. No. 164537) (challenging orders 8-80 (industries handling products after harvest), 13-80 (industries preparing agricultural products for market, on the farm), 14-80 (agricultural occupations); (2) California Manufacturers Assn. v. IWC (Orange County Super. Ct. No. 325866) (challenging orders 1-80 (manufacturing industry), 3-80 (canning, freezing and preserving industry), 4-80 (professional, technical, clerical, mechanical and similar occupations), 8-80); (3) San Joaquin Nisei Farmers League et al. v. IWC (Stanislaus County Super. Ct. No. 164580) (challenging orders 8-80, 13-80, and 14-80); and (4) California Trucking Association et al. v. IWC (Kings County Super. Ct. No. 31321) (challenging orders 5-80 (public housekeeping industry), 9-80 (transportation industry) and 10-80 (amusement and recreation industry).

respect to a number of common legal issues raised in each of the separate lawsuits. As a consequence, in some industries employees were denied the benefits of the 1976 wage orders, while in other industries similarly situated employees were afforded the protections of the orders. After the normal, lengthy process of trial and appeal, one of the cases challenging the 1976 orders reached this court for decision in 1979. In *California Hotel & Motel Assn.* v. *Industrial Welfare Com.* (1979) 25 Cal.3d 200 [157 Cal.Rptr. 840, 599 P.2d 31], our court resolved several of the common legal issues presented in the challenges to the 1976 wage orders, but at the same time determined that a number of other legal issues "could be dealt with more appropriately" in a future case in which the IWC had explained the basis of its wage orders in a fashion consistent with our holding in that case. (25 Cal.3d at pp. 204-205, fn. 2.)

In February 1980, two months after the institution of the four December 1979 lawsuits noted above, the Attorney General, acting on behalf of the IWC, initiated this proceeding seeking an original writ of mandate or prohibition from this court. The Attorney General's petition alleged that each of the four mandate actions filed in December 1979 presented a number of common legal issues, many of which had been raised but left unresolved in *California Hotel & Motel Assn.* The petition also suggested that if the lower court actions were permitted to run their normal course, there was a significant possibility that the history of the 1976 wage order litigation would repeat itself, with lower courts reaching disparate results on common legal issues, and with employees in many industries being deprived of the protection of the 1980 wage orders for perhaps as long as several years. Under these circumstances, the Attorney General urged this court to issue an alternative writ and to provide a prompt and definitive resolution of the numerous

common legal issues raised in the various court actions below.

In view of the large number of employees affected by the challenged orders, and the tortuous litigation history which had prevented the implementation of the majority of IWC wage orders in recent years, we concluded that this was an appropriate instance for the exercise of our original jurisdiction, and accordingly we issued an alternative writ of mandate. (See, e.g., *Agricultural Labor Relations Bd.* v. *Superior Court* (1976) 16 Cal.3d 392, 402 [128 Cal.Rptr. 183, 546 P.2d 687].) Although the employers claim that we lack jurisdiction to review the legal challenges to any of the 1980 wage orders because none of the trial courts has as yet entered a judgment on the merits, the Court of Appeal in *Rivera* v. *Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 580-581 [71 Cal.Rptr. 739], acted under similar circumstances to review the validity of an IWC wage order in an original mandate proceeding instituted in the appellate court.[3]

Moreover, because the stay orders issued by several of the respondent courts have the practical effect of enjoining the operation of an administrative regulation promulgated pursuant to the IWC's quasi-legislative authority, past authorities teach that if this court concludes that the challenged

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[3]The employers additionally argue that this court should not act at this time because there are allegedly numerous factual issues upon which evidence must be taken. We do not believe, however, that the alleged factual disputes preclude our consideration of the employers' legal challenges to the wage orders at this stage. As we explained under similar circumstances in *Burrey* v. *Embarcadero Mun. Improvement Dist.* (1971) 5 Cal.3d 671, 676 [97 Cal.Rptr. 203, 488 P.2d 395]: "Respondents argue that we should not exercise our jurisdiction because there exist numerous questions of fact which must be resolved prior to any decision in the case. The petition for writ of mandate does contain allegations of fact which are controverted by respondent and intervener. [sic] We are satisfied that these disputed facts are either not material to our resolution of the case, or may be resolved by judicial notice."

orders are in fact valid, the lower court's issuance of such quasi-injunctive relief would properly be subject to correction by extraordinary writ. (See, e.g., *Agricultural Labor Relations Bd. v. Superior Court, supra,* 16 Cal.3d at p. 401.) Accordingly, we conclude that this matter is properly before this court.

1. *Background and general principles of review.*

Before undertaking an analysis of the numerous legal contentions which the employers have advanced in support of their attack upon the 1980 wage orders, we believe it may be helpful to summarize very briefly the historical backaground of the IWC's jurisdiction and the established legal principles which govern judicial review of the commission's administrative orders.

The IWC is a five-member appointive board initially established by the Legislature in 1913. For the first 60 years of its existence, the IWC's mission was to regulate the wages, hours and conditions of employment of *women and children* employed in this state, in furtherance of such employees' "health and welfare." To this end, the commission—beginning in 1916—promulgated a series of industry- and occupation-wide "wage orders," prescribing various minimum requirements with respect to wages, hours and working conditions to protect the health and welfare of women and child laborers. For many decades, IWC wage orders have embraced a variety of subjects comparable in scope to the 1980 wage orders at issue in this case.

In the early 1970s, a number of federal judicial decisions invalidated a substantial portion of the then-prevailing IWC wage orders on the ground that the limited application of such orders to *women* workers (and children) violated the prohibition on sex discrimination embodied in title [sic] VII of the federal [sic] Civil Rights Act of 1964. (See, e.g.,

Rosenfeld v. Southern Pacific Co. (9th Cir. 1971) 444 F.2d 1219, 1225-1227; *Homemakers, Inc., Los Angeles v. Division of Indust. Welf.* (N.D. Cal. 1973) 356 F.Supp. 1111, affd. (9th Cir. 1974) 509 F.2d 20, cert. den. (1976) 423 U.S. 1063 [46 L.Ed.2d 655, 96 S.Ct. 803]; and cases cited, 509 F.2d at p. 23, fn. 7.) In response to these federal decisions, the California Legislature in 1972 and 1973 amended the applicable provisions of the Labor Code to authorize the IWC to establish minimum wages, maximum hours and standard conditions of employment for *all* employees in the state, men as well as women. (Stats. 1972, ch. 1122, §§ 2-6, pp. 2153-2155; Stats. 1973, ch. 1007, §§ 1.5-4, pp. 2002-2003.) The constitutionality of this legislative expansion of the IWC's jurisdiction to all California workers is explicitly confirmed by Article XIV section 1 of the California Constitution which declares: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on acommission legislative, executive and judicial powers."[4]

Although the 1973 modification of the IWC's jurisdiction to encompass men as well as women and minors clearly worked a substantial expansion in the number of workers affected by the commission's orders, and, as a practical matter, was probably a major impetus to the host of litigation that has surrounded the commission's wage orders since 1973, the 1973 legislation did not alter the basic nature of

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[4]Article XIV section 1 replaced former article XX, section 17½ which, prior to 1970, provided: "The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

the IWC's decision-making authority or the basic principles governing judicial review of the commission's exercise of that authority. From its inception in 1913 to the present, the commission has been vested with broad statutory authority to investigate "the comfort, health, safety, and welfare" of the California employees under its aegis (§ 1173, enacted Stats. 1913, ch. 324, § 3, p. 633) and to establish (1) "[a] minimum wage . . . which shall not be less than a wage adequate to supply . . . the necessary cost of proper living and to maintain the health and welfare of such [employees]," (2) "[t]he maximum hours of work consistent with the health and welfare of [such employees]" and (3) [t]he standard conditions of labor demanded by the health and welfare of [such employees] . . . ." (§ 1182, enacted Stats. 1913, ch. 324, § 6, pp. 634-635.)

Indeed, the 1973 act—while retaining the authorizing language of section 1182 quoted above—restated the commission's responsibility in even broader terms, directing the commission continually to review and to update its "rules, regulations and policies to the extent found by the commission to be necessary to provide *adequate and reasonable wages, hours, and working conditions appropriate for all employees in the modern society*." (Italics added.) (§ 1173, enacted Stats. 1973, ch. 1007, § 1.5, p. 2002.)

Judicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion. (See, e.g., *California Hotel & Motel Assn., supra,* 25 Cal.3d 200, 211; *California State Restaurant Assn.* v. *Whitlow* (1976) 58 Cal.App.3d 340, 344 [129 Cal.Rptr. 824]; *California Grape etc. League* v. *Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 708 [74 Cal.Rptr. 313]; *Rivera*

v. *Division of Industrial Welfare, supra,* 265 Cal.App.2d 576, 586, 591, 595.)

Because of the quasi-legislative nature of the IWC's authority, the judiciary has recognized that its review of the commission's wage orders is properly circumscribed. As the Court of Appeal noted in *Rivera, supra,* 265 Cal.App.2d 576, 594: "A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision; rather, the review is limited to an examination of the proceedings to determine whether the action is arbitrary or entirely lacking in evidentiary support or whether the agency has violated the procedure required by law; in these technical matters requiring the assistance of experts and the collection and study of statistical data, courts let administrative boards and officers work out their problems with as little judicial interference as possible." (Fn. omitted.)

Moreover, past decisions additionally teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection. As the court observed in *California Grape etc. League, supra,* 268 Cal.App.2d 692, 698; "Remedial statutes such as those under consideration [i.e., the statutes governing the adoption of wage orders] are to be liberally construed. [Citation.] They are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished. . . . [¶] Regulations and orders of the Industrial Welfare Commission are presumed to be *reasonable and lawful.*" (Italics in original.)

With these general principles of judicial review and statutory construction in mind, we turn to the numerous legal

challenges which the employers have mounted against the IWC's 1980 wage orders. The employers contend that the 1980 wage orders are fatally flawed on both procedural and substantive levels. Procedurally, the employers argue that the wage orders are invalid because the IWC (1) failed to conduct an adequate "investigation" under section 1178 before selecting wage boards, (2) failed to include an adequate "statement as to the basis upon which the order is predicated" as required by section 1177, and (3) failed to comply with the requirements of the California Environmental Quality Act of 1970 (CEQA) prior to the adoption of the orders.

Substantively, the employers contend (1) that all of the various provisions of the wage orders dealing with the health and safety of employees are invalid because only the California Occupational Safety and Health Standards Board, and not the IWC, has jurisdiction to act on such matters and (2) that various labor relation statutes preclude the IWC from setting fixed minimum standards with respect to matters that the labor laws leave to the collective bargaining process between employers and employees. As we explain, we have concluded that none of these objections to the 1980 wage orders has merit.[5]

2. *The IWC complied with the pre-wage board "investigation" requirements of section 1178.*

The employers initially contend that all of the 1980 wage orders are invalid in their entirety because the IWC allegedly failed to comply with an initial step in the elaborate pro-

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[5]In addition to the general common legal issues enumerated above, a number of the mandate actions filed below set forth additional contentions directed at more specific and limited portions of the various wage orders. We address these additional contentions in section 7 below, and conclude that all of these challenges also lack merit.

cedure established by Labor Code section 1178 for the adoption of commission regulations fixing minimum wages, maximum working hours and standard conditions of employment. To place this contention in context, we set forth the lengthy provisions of section 1178 in full.

Section 1178 provides: "If after investigation the commission finds that in any occupation, trade, or industry, the wages paid to employees are inadequate to supply the cost of proper living, or that the hours or conditions of labor are prejudicial to the health, morals, or welfare of employees, the commission shall select a wage board to consider any of such matters. Such wage board shall be composed of an equal number of representatives of employers and employees in the occupation, trade, or industry in question; and a representative of the commission to be designated by it, who shall act as chairman of the wage board on request of the commission. The wage board shall report and make recommendations to the commission, including therein:

"(a) An estimate of the minimum wage adequate to supply the necessary cost of proper living to, and maintain the health and welfare of employees engaged in the occupation, trade, or industry in question.

"(b) The number of hours of work per day in the occupation, trade, or industry in question, consistent with the health and welfare of employees.

"(c) The standard conditions of labor in the occupation, trade, or industry in question, demanded by the health and welfare of employees.

"Before promulgating an order relating to wages, hours, or conditions of labor for the occupation, trade, or industry in question, and after receipt of the report from the wage board, the commission shall prepare proposed regulations for the occupation, trade, or industry in question and then shall hold a public hearing. The proceedings shall be re-

corded and transcribed and shall thereafter be a matter of public record. Whenever the occupation, trade, or industry in question is statewide in scope, a public hearing shall be held in each of two cities in this state; when it is not statewide, a public hearing shall be held in the locality where the occupation, trade, or industry prevails."

The employers concede that before the 1980 wage orders were adopted (1) the IWC convened wage boards for each of the industrial and occupational groupings to consider the updating of its prior wage orders, (2) the wage boards received recommendations and statements from affected individuals and prepared wage board reports containing recommendations as to revisions, (3) the IWC reviewed the wage board reports and the records of the wage board proceedings and, after deliberation, prepared and published proposed revisions of the existing wage orders, (4) the IWC held public hearings throughout the state on the proposed revisions, and (5) the IWC considered the additional matters raised in the public hearings, amended its proposed orders, and finally on September 7, 1979, adopted its 1980 wage orders together with a statement as to the basis of each order.

Despite this extensive procedure, the employers, focusing upon the initial passage of section 1178 which states that "[i]f *after investigation* the commission finds that . . . the wages paid to employees are inadequate to supply the cost of proper living, or that the hours and conditions of labor are prejudicial to the health, morals or welfare of employees, the commission shall select a wage board to consider any of such matters. . . ." (italics added), maintain that the 1980 wage orders are invalid because of the commission's alleged failure to conduct an "adequate" investigation *prior to* convening the wage boards. The plaintiffs in *California Hotel & Motel Assn.* raised a similar contention, but our

court ultimately concluded that we did not need to determine the general scope of the prewage board investigation provision of section 1178 in that case, for we found that other provisions of the 1973 legislation, directing the IWC to undertake a "full review" of its orders "forthwith," had in any event relieved the commission of any separate prewage board investigation requirement prior to the promulgation of the 1976 wage orders. (See 25 Cal.3d at pp. 206-209.) We now address the issue which we did not reach in *California Hotel & Motel Assn*, and, as we shall explain, we conclude that the IWC fully complied with the requirements of section 1178.[6]

On May 8, 1978, the IWC voted to open the 1976 wage orders for full review by wage boards. At that time, the commission unanimously adopted a statement explaining that "Section 1173 of the Labor Code requires that the Commission conduct a full review of all existing rules, regulations and policies made under its jurisdiction at least once every two calendar years. *The Commission has made a continuous investigation of wages, hours, and working*

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[6]In addition to contending that it has fully complied with the prewage board investigation provision of Section 1178, the IWC points out that section 1173, as amended in 1973, directed the commission not only to undertake a "full review" of its orders "forthwith," but also required the commission to "conduct such a full review *at least once every two calendar years*, or at such more frequent times as the commission, based upon then current conditions, deems appropriate." (Italics added.) (Stats. 1973, ch. 1007, § 1.5, p. 2002.)

The commission maintains that, as in *California Hotel & Motel Assn.*, this statutory mandate of a "full review" of existing orders at least once every two years itself authorizes the commission, as part of its biennial review, to convene wage boards without regard to any prewage board investigation. Because, as we explain below, we conclude that the commission complied with the preliminary investigation requirements of section 1178, we need not decide whether section 1173's mandate of a full review once every two years in itself empowers the commission to initiate the wage board procedure as part of its full review.

conditions affecting employees in industries, trades and occupations covered by its orders, and it also takes official notice of the substantial inflation affecting all members of society, and the recent increase in the federal minimum wage. It thereby concludes that it would be imperative to conduct a full review of the existing wage orders in order to provide for the health and welfare of employees and wages adequate to supply them with the necessary cost of proper living even if Section 1173 did not dictate a full review at that time." (Italics added.)

Although the employers acknowledge that the commission, as part of its on-going duties under section 1173,[7] gathers a voluminous quantity of statistical and other data from governmental and private studies with respect to economic trends and employment conditions,[8] the employers contend that this normal on-going commission activity does not constitute "adequate" investigation to satisfy the "after investigation" provision of section 1178. While the employers concede that section 1178 establishes no standard as to the required depth or breadth of investigation contem-

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[7]Section 1173 provides in relevant part: "*It shall be the continuing duty of the Industrial Welfare Commission. . .*to ascertain the wages paid to all employees in this state, and to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and *to investigate the comfort, health, safety, and welfare of such employees.*" (Italics added.)

[8]The administrative record in this case contains a variety of information obtained by the commission members prior to their decision to convene wage boards to review the existing wage orders. That information includes: (1) proposed and enacted state and federal legislation affecting wages, hours, and working conditions, (2) complaints and correspondence from employees and employers concerning wages, hours and working conditions, (3) studies, surveys, reports and bulletins from the California Department of Industrial Relations, and the California Health and Welfare Agency, and from the United States Department of Labor and Department of Agriculture, and (4) transcripts of hearings held by the IWC with respect to minimum wage and related compensation.

plated before wage boards are convened, the employers apparently maintain that the investigation in this case was not adequate because it did not involve field investigation and did not apprise the commission of *specific* changes that were needed in the existing wage orders.

We think the employers have misconceived the nature of the preliminary investigation contemplated by section 1178, as well as the administrative agency's discretion in determining the extent of the investigation necessary. As the United States Supreme Court has explained in a similar context: "[An agency's] duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.' [Citation.] These principles are particularly apt . . . where Congress has simply told the [agency] to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." (*Railway Clerks* v. *Employees Assn.* (1965) 380 U.S. 650, 662 [14 L.Ed.2d 133, 141-142, 85 S.Ct. 1192]; see, e.g., *Inland Empire Council* v. *Millis* (1945) 325 U.S. 697, 706 [89 L.Ed. 1877, 1883, 65 S.Ct., 1316]; *Ruby* v. *American Airlines, Inc.* (2d Cir. 1963) 323 F.2d 248, 255.)

As the full text of section 1178 makes clear, the prewage board investigation contemplated by the statute is only the first step in a lengthy administrative process by which the IWC determines whether existing wage orders are adequate and decides if and how any present orders should be modified. The section does not require the commission to formulate specific proposed modifications of the present orders before selecting the wage boards; indeed, as the Court of Appeal observed in *California Grape etc. League,* "it would be contrary to the clear purpose of the statute for the com-

mission to arrive at specific proposals without benefit of the views and advice of interested persons on the wage board and at the public hearings." (268 Cal.App.2d 692, 708.)

Instead, the investigation contemplated is simply a preliminary inquiry to determine whether there is sufficient question as to the adequacy of the existing wage orders that wage boards ought to be selected. In this context, we think that the commission's reliance on the statistical and other data compiled in its normal investigative process, along with its consideration of the obvious effect on employees of the economy's rapidly increasing inflation, clearly sufficed to justify the convening of wage boards to review the adequacy of the existing orders under section 1178.

Authorities construing statutes embodying similar preliminary investigation requirements confirm this conclusion. In *Modern Plastics Corporation* v. *McCulloch* (6th Cir. 1968) 400 F.2d 14, for example, an employer sought to enjoin the NLRB from conducting a representation election among the company's employees on the ground that the NLRB had failed to comply with section 9(c) of the NLRA (29 U.S.C. § 159(c)) which provides in part that "[w]henever a [representation] petition shall have been filed . . . the Board *shall investigate* such petition. . . ." (Italics added.) In rejecting the employer's contention, the *Modern Plastics* court pointed out that the investigation contemplated by the statute was simply a preliminary inquiry to determine whether there was sufficient question as to representation so as to warrant holding a formal hearing on the issue. Because the investigation contemplated by the statute was only a threshold step leading to further administrative procedures, the court concluded that the agency had not violated the statute merely because it had not undertaken any formal field investigation before deciding to go forward with a hearing, when the facts before the relevant administrative

official "were not so plainly insubstantial that he could not reasonably conclude that a sufficient question of representation existed to justify inquiry through the usual . . . hearing." (400 F.2d at p. 19.)

In like manner, the facts within the knowledge of the commission in May 1978—by virtue of its continuing investigation and the readily ascertainable increasing inflation—were certainly sufficient to permit the commission to conclude that "further inquiry" into the adequacy of the existing wage orders through the wage board procedure was warranted. Under these circumstances, the commission did not violate section 1178 in reopening the wage orders for review by wage boards.

Our conclusion in this regard is buttressed by the history of section 1178. The "after investigation" language of section 1178 relied upon by the employers has been part of California law since the inception of the IWC in 1913. (Stats. 1913, ch. 324, § 5, p. 634.) Past cases indicate that the commission has long interpreted the statute as authorizing the opening of existing wage orders and the convening of wage boards on the basis of its review of data comparable to the matters that were before the IWC in the instant case. (See, e.g., *Rivera* v. *Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 582-584, 590 [71 Cal.Rptr. 739]. See also *Cal. Drive-in Restaurant Assn.* v. *Clark* (1943) 22 Cal.2d 287, 301 [140 P.2d 657, 147 A.L.R. 1028].)

Furthermore, while section 1178 has been amended on several occasions, the Legislature has never altered the "after investigation" language to indicate that the commission's long-standing interpretation of the section is erroneous. As California courts have noted, "[r]eenactment of a provision which has a meaning well established by administrative construction is persuasive that the intent was to continue the same construction previously recognized and

applied." (*Cal. M. Express* v. *St. Bd. of Equalization* (1955) 133 Cal.App.2d 237, 239-240 [283 P.2d 1063]; see, e.g., *Coca Cola Co.* v. *State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [156 P.2d 1].)

Finally, even if the commission's prewage board investigation was in some respects inadequate—which we do not believe to be the case—we do not understand how such a deficiency realistically prejudiced the employers so as to justify setting aside the entire 1980 wage orders. (Cf. *Modern Plastics Corp.* v. *McCulloch, supra,* 400 F.2d 14, 17, fn. 5.) The employers had a full opportunity during both the wage board proceedings and the subsequent public hearings to fully apprise the commission of all relevant facts and to present arguments and recommendations either in support of or in opposition to changes in the wage orders. Under these circumstances, we would be loath to overturn vital administrative regulations on the basis of a minor, nonprejudicial misstep. As the Fifth Circuit Court of Appeals has observed: "Courts . . ., as partners with . . . agencies in the effectuation of [legislative] will through the administrative process, . . . do not function to strike down agency action because of merely formal or technical flaws." (*Ala. Ass'n of Ins. A.* v. *Bd. of Gov. of F. R. System* (5th Cir. 1976) 533 F.2d 224, 236.)

Accordingly, we conclude that the IWC adequately complied with section 1178 prior to convening wage boards to consider the 1980 wage orders.

3. *The "statements as to basis" accompanying the 1980 wage orders comply with the requirements of section 1177 as articulated in California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal.3d 200.*

The employers next contend that in adopting the 1980 wage orders the IWC failed to comply with Labor Code section 1177 which provides in relevant part: "Each order

of the commission shall include a statement as to the basis upon which the order is predicated and shall be concurred in by a majority of the commissioners.'' The employers acknowledge that each of the commission's 1980 orders includes a lengthy document entitled ''Statement as to Basis,'' concurred in by a majority of the commissioners, providing a section-by-section analysis and explanation for each portion of the accompanying wage orders. The employers maintain, however, that the statements are not sufficiently detailed to satisfy the statutory requirements of section 1177 under this court's recent decision in *California Hotel & Motel Assn.* As we shall explain, the employers' contention misconceives the basic thrust of this court's holding in *California Hotel & Motel Assn.* and, contrary to that decision, seeks to read into section 1177 unreasonably burdensome requirements that are basically incompatible with the commission's quasi-legislative task.

In *California Hotel & Motel Assn.*, this court reviewed the validity of one of IWC's 1976 wage orders, order 5-76, dealing with the public housekeeping industry. Unlike the 1980 wage orders now before us, the order contained no provision or document which specifically purported to be a statement as to the basis of the order as required by section 1177. The commission, however, contended that the statement as to basis requirement of section 1177 was satisfied by a paragraph in the order, entitled ''To Whom It May Concern,'' which read as follows:

''To Whom It May Concern: Take Notice: That pursuant to the Legislature's 1973 mandate to the Industrial Welfare Commission to review, update and promulgate regulations necessary to provide adequate and reasonable wages, hours, and working conditions appropriate for all employees, and by virtue of authority vested in the Commission by section 1171 through 1204 of the Labor Code of the State of Cal-

ifornia, and after investigation and findings pursuant to section 1178 and after receiving recommendations from duly appointed wage boards, and after consideration of all written material and information submitted, and after public hearings duly held, notice of said hearings having been duly given in the manner provided by law, the Industrial Welfare Commission, upon its own motion has found and concluded that its Public Housekeeping Industry Order, Number 5-68, enacted on September 24, 1967 and its Minimum Wage Order 1-74 enacted on January 1, 1974, should be altered and amended.

"Now, Therefore, the Industrial Welfare Commission of the State of California does hereby alter and amend said Public Housekeeping Industry Order, Number 5-68, and its Minimum Wage Order 1-74."

In *California Hotel & Motel Assn.* our court rejected the commission's contention in this regard, concluding that the commission had misinterpreted the fundamental purpose of section 1177 by suggesting that the provision could be satisfied by a statement which simply listed the statutory basis, i.e., the authorzing statutes, for the agency's regulatory action. Instead, adverting to the legislative history of the provision and to an analogous provision of the federal Administrative Procedure Act (APA),[9] we pointed out that the statute was a response to the Legislature's belief "that the

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[9]Section 4(c) of the APA (5 U.S.C. § 553(c)) reads in pertinent part: "After consideration of the relevant matters presented [in an informal rule-making proceeding], the agency shall incorporate in the rules adopted *a concise general statement of their basis and purpose*." (Italics added.) In view of the similarity of this provision to section 1177, we indicate in *California Hotel & Motel Assn.* that federal authorities construing section 4(c), while not controlling, will often be persuasive in interpreting section 1177. (See 25 Cal.3d at p. 210, fn. 20, *id.*, at pp. 219-220 (Christian, J., conc.).) As noted *post*, we have utilized a number of such federal authorities in reaching our conclusions in the instant case.

public has a right to know *the reasons for the laws which govern them*'' (italics added) (25 Cal.3d at p. 210, fn. 21), and accordingly we concluded that section 1177 contemplated that the IWC would provide a reasoned explanation to accompany its orders, an explanation that would ''reflect the factual, legal and policy foundations for the action taken.'' (*Id.*, at p. 213.)[10]

At the same time, however, we recognized that in promulgating wage orders the IWC is involved in a quasi-legislative, rather than a quasi-judicial endeavor, and we cautioned that ''[t]he statement of basis is not the equivalent of the findings of fact that a court may be required to make.'' (*Id.*) Instead, we emphasized that what section 1177 demands is simply ''*an explanation of how and why the Commission did what it did.*'' (Italics added.) (Id.) Because the ''To Whom it May Concern'' paragraph did not fulfill this basic function, we concluded that the commission had failed to comply with section 1177 in initially adopting order 5-76.

The 1980 wage orders at issue in this case were promulgated shortly after this court's decision in *California Hotel & Motel Assn.*, and the statements as to the basis of such orders were quite evidently drafted with that decision's guidelines firmly in mind. Unlike the ''To Whom it May

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[10]We explained this requirement as follows: ''If terms of the order turn on factual issues, the statement must demonstrate reasonable support in the administrative record for the factual determinations. If, on the other hand, the terms of the order turn on policy choices, an assessment of risks or alternatives, or predictions of economic or social consequences, the statement of basis must show how the commission resolved conflicting interests and how that resolution led to the order chosen. If an order differentiates among classes of industries, employers, or employees, the statement of basis must show that the distinctions drawn are reasonably supported by the administrative record and are reasonably related to the purposes of the enabling statute.'' (25 Cal.3d at p. 214.)

Concern'' paragraph of the initial 1976 orders, the statements accompanying the 1980 orders deal directly with the substantive provisions of each of the orders, and provide concise and clearly worded explanations for the various provisions of those orders. The statements make frequent reference to specific comments and recommendations raised in the course of the lengthy administrative proceedings and indicate why the commission decided to adopt some proposals and declined to adopt others; when the wage orders impose different regulations on some industries than are imposed on others, or exempt some occupations from generally applicable requirements, the statements explain the differential treatment. Indeed, a reading of the numerous statements as to basis in the 1980 orders leaves little doubt that the commission has made a thorough and conscientious effort to explain ''how and why [it] did what it did.'' (25 Cal.3d at p. 213.)

The employers assert, however, that the commission's efforts in this regard were insufficient, and they level a multi-pronged attack challenging the adequacy of virtually every statement as to basis in all of the wage orders under review. We do not believe that it is necessary, in this proceeding, to review each of the employers' numerous attacks separately. As we shall explain, an analysis of several representative challenges mounted by the employers reveals the general tenor and, in our view, misguided nature, of the employers' various contentions.

The employers initially challenge the adequacy of the statement as to basis relating to section 3 of the wage orders, concerning ''Hours and Days of Work.'' The statement adopted by the commission reads in relevant part:

''The 8-hour day, 40-hour week is an accepted standard in American society. Federal law embodying these standards (Walsh-Healy Act and Fair Labor Standards Act) was en-

acted with the purpose of encouraging employers to hire more employees when they have need for labor in excess of 40 hours a week. The California Legislature declares that 'eight hours of labor constitutes a day's work' (Labor Code Section 510). Employee representatives continue to express their conviction that a regular schedule of work beyond eight hours a day is detrimental to the health and welfare of employees.

"The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees covered by this order. Employers have objected to the requirement for overtime pay after 8 hours a day and in 1976 they urged a 10-hour day without overtime, asserting that employees favored such a schedule to save travel time and expense and to have more leisure for weekend trips. The Commission provided for such alternative in the 1976 Order, specifying conditions under which employees could exercise a choice. In the review just completed, employee representatives [o]n the wage board and in public hearing asked that the provisions for four 10-hour days be deleted. Some complained that once employees voted for such a schedule there was no way to get out of it even when employees found, from experience, that it was detrimental to their welfare. Employer representatives on wage boards and in public hearing proposed an alternative of three or four workdays of not more than 12 hours each without overtime. In view of the accepted 8-hour day standard, social experience, and testimony by employees the Commission determined that a 12-hour day generally is detrimental to the welfare of employees. Where, in special circumstances, employees and employer agree in collective bargaining that it is not detrimental, provision is made for such exception as described below. The Commission did retain the provision for the

week of four 10-hour days, and made it more flexible at the request of some employers and employees by allowing the four days to be worked any time within the work week so long as the employee received two consecutive days off. Previously the four days had to be scheduled within five consecutive days.

"At the same time the Commission acknowledges the employees' problem of being trapped in such a schedule when it proved to be detrimental and provided a means of voting out such a schedule (Section 3(B)(4)) under reasonable conditions which protect the employer against frivolous or too frequent changes."

In questioning the adequacy of this lengthy statement, the employers concede that "[i]t would be difficult to attack the Commission's apparent conclusion that an eight hour day is consistent with the health and welfare of employees" but argue that the statement is deficient for failing to indicate why the Commission concluded that "an eight-hour day is the *only* work day consistent with the health and welfare of employees." (Employers' italics.) In a similar vein, the employers argue that the statement does not satisfy the requirement of section 1177, as interpreted in *California Hotel & Motel Assn.*, because while the statement explains why the commission decided to permit a 10-hour day, 4-day week without overtime pay, it does not indicate why the commission did not permit any other alternative 40-hour week.

In essence, the employers' contention amounts to an assertion that under section 1177, the commission must not only explain why it adopted the orders that it did, but also detail its reason for not adopting the myriad of possible alternatives to its regulations. Such an interpretation of section 1177, however, would be totally impractical and would impose an unreasonable burden upon the agency. As one

federal court has explained in an analogous context. "A rule-making agency makes not one but dozens of 'ultimate' decisions—not only because a set of regulations has many provisions, but also because adoption of any one provision constitutes simultaneous rejection of many possible alternatives. . . . [¶] For these reasons we think petitioners' expansive reading of the 'findings' requirements . . . [to require findings as to such alternatives] is inherently unrealistic. To require [such] findings of a rule-making agency . . . would be to invite endless confusion and great uncertainty." (*Amoco Oil Co.* v. *Environmental Protection Agency* (D.C.Cir. 1974) 501 F.2d 722, 734-735.)

Indeed, we think that the governing legislation itself demonstrates that the Legislature, in enacting section 1177, did not intend to require the extraordinarily extensive statement as to basis that would be required under the employers' proposed interpretation. As we recognized in *California Hotel & Motel Assn., supra,* 25 Cal.3d at page 215, section 1177 provides that the statement as to basis is to be included as an integral part of each wage order; section 1183, in turn, requires that the commission mail a copy of such orders to employers covered by the order and directs such employers to "post a copy thereof in the building in which employees affected by the order are employed." These statutes demonstrate that the Legislature contemplated that the statement as to basis would take a form that could reasonably be posted in places of employment and could be read and understood by the employers and employees affected by the order.

This legislative purpose of effectively informing employers and employees of the basic reasons for the commission's actions would be defeated if we were to interpret the statute to require a statement so lengthy and detailed that, in practice, such statement would have to been printed in extremely small type or in a document so extended that

no one could reasonably be expected to read it. As the United States Supreme Court has recently emphasized in another context: "*Meaningful* disclosure does not [necessarily] mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . "informational overload" . . . .' " (*Ford Motor Credit Co.* v. *Milhollin* (1980) — U.S. —, — [63 L.Ed.2d 22, 33, 100 S.Ct. 790, 798].)

The employers also challenge the adequacy of the statements as to the basis of a number of sections of the 1980 wage orders in which the commission made no changes whatsoever from previous wage orders. Thus, for example, the statement as to the basis of section 12, Rest Periods,[11] reads: "The Commission received no compelling evidence and concluded that there was no rationale to warrant any change in this section, *the basic provisions of which date back to 1932*. It also noted that administrative exemptions are available if warranted under provisions of section 17 of this order." (Italics added.) The employers contend that even when no change from a previous order is implemented, section 1177 requires the IWC to provide a full explanation for the original adoption of the provision and precludes the commission from simply indicating the historical basis of the order.

As this court explained in *California Hotel & Motel Assn.*, however, the legislative history of section 1177 indicates that the section was intended to ensure that the commission

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[11]The rest period provision of wage order 1-80 provides in full: "Every employer shall authorize and permit employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

"However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

would "accompany any *new* or *revised* order" with an explanation for the agency's determinations. (Italics added.) (25 Cal.3d at p. 210, fn. 21.) When the commission, on the basis of its investigation, wage board proceedings and public hearings, determines that an existing regulation should be altered or a new regulation promulgated, section 1177 requires that the commission explain the reason for the new or revised rule. When the commission concludes that no such modification is warranted, however, no comparable explanation is necessary, for the commission is simply continuing in effect a regulation that has previously become a part of the standard working conditions of "employees in the modern society." (§ 1173.) Although we can perhaps conjure that, under some circumstances, underlying societal conditions may so change as to reasonably require an explanation from the IWC for its decision to continue a particular working condition regulation in effect, we do not believe that the commission's retention of the long-standing provisions in this case—involving rest periods, meal periods, and the like—require any such justification.

Finally, the employers contend that a number of the statements as to basis are deficient even though they contain a general explanation of the commission's actions because the statements do not specifically respond to some comments or suggestions raised by wage boards or affected individuals at some point in the administrative process. Once again, however, the employers' argument would expand the statement as to basis beyond all reasonable bounds. As the Fifth Circuit has observed with respect to the analogous "statement of basis and purpose" called for by section 4(c) of the federal APA: "It is not expected that the agency will discuss in detail every item of fact or opinion included in the comments submitted to it. [What] is expected [is] that the agency's concise general statement of basis and purpose

. . . 'will enable us to see what *major issues of policy were ventilated by the [administrative] proceedings and why the agency reacted to them as it did.*' " (Italics added.) (*General Telephone Co. of Southwest* v. *United States* (5th Cir. 1971) 449 F.2d 846, 862.) In our view the statements as to the basis of the 1980 wage orders adequately fulfill this function.

In sum, we conclude that the 1980 statements as to basis, promulgated in the wake of this court's decision in *California Hotel & Motel Assn.*, satisfy the requirements of section 1177 as articulated in that decision.

4. *The IWC did not violate the provisions of CEQA in promulgating the 1980 wage orders, since such orders are specifically exempted from the statutory requirements under title 14, section 15124 of the California Administrative Code.*

The employers next argue that the 1980 wage orders are invalid because of the IWC's alleged failure to comply with the requirements of CEQA, relating to the preparation of an "environmental impact report" or a "negative declaration," prior to the promulgation of its wage orders. As we explain, this contention is clearly without merit, for the commission's wage orders have been explicitly exempted from the statutory requirements of CEQA by a valid administrative regulation.

In enacting CEQA to protect the environment of California, the Legislature recognized that not all actions of governmental agencies have significant environmental effect, and concluded that it was desirable to exempt certain categories of governmental actions from the generally applicable requirements of the statute. Accordingly, the Legislature in section 21084 of the Public Resources Code, directed the Secretary of the California Resources Agency

to promulgate as part of the administrative guidelines governing the administration of CEQA, "a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt from the provisions of this division."

Acting pursuant to this directive, the Secretary of Resources has established a list of classes of projects which, by regulation, are declared "to be categorically exempt from the requirement for the preparation of environmental documents." In February 1978, the secretary adopted section 15124 of title 14 of the California Administrative Code which categorically exempts from CEQA's requirements "actions taken by regulatory agencies, including the Industrial Welfare Commission as authorized by statute to regulate any of the following: (a) Employee wages, (b) Hours of work, or (c) Working conditions where there will be no demonstrable physical changes outside the place of work." Under this regulation, the IWC had no obligation to prepare an environmental impact report or negative declaration prior to the adoption of the wage impact report or negative declaration prior to the adoption of the wage orders at issue here.[12]

Although the employers recognize that the regulation in question exempts IWC wage orders from the application of CEQA, the employers contend that the Secretary of Resources exceeded his statutory authority in adopting section 15124. In support of this argument, the employers rely on this court's decision in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 204-206 [132 Cal.Rptr. 377, 553 P.2d 537], in which we held that an administrative regulation catego-

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[12]Before promulgating the 1980 orders, the IWC specifically made a written finding "that none of its proposed regulations would make a demonstrable physical change outside the place of work or have a significant effect on the environment."

rically exempting "actions taken . . . to assure the maintenance, restoration or enhancement of a natural resource . . ." could not properly be interpreted as creating an exemption from CEQA for actions of the Fish and Game Commission in fixing hunting or fishing seasons.

In reaching that conclusion in *Wildlife Alive*, however, we recognized that "the setting of hunting and fishing seasons has the potential for a significant environmental impact, both favorable and unfavorable," and that "[t]here inheres in the fixing of hunting seasons and the issuance of hunting permits a serious risk of overkill and depletion of the affected species." (18 Cal.3d at p. 206.) Noting that under section 21084 "[t]he secretary is empowered to exempt only those activities which do not have a significant effect on the environment" (*id.*, at p. 205), we concluded that because of the obvious possibility that the setting of hunting and fishing seasons would have a significant effect on the environment, an interpretation of the exempting regulation to cover such administrative acts would cast doubt on the validity of the regulation.

From an environmental standpoint, however, the wage orders at issue in this case are obviously a far cry from the administrative regulations fixing hunting and fishing seasons which were before our court in *Wildlife Alive*. Unlike hunting and fishing season regulations which affect wildlife in a very direct and unambiguous manner, the IWC regulations governing the wages, hours and working conditions of employees have no obvious effect on the environment.

Indeed, the employers in the present case in effect concede the absence of any such *direct* effect, arguing only that the categorical exemption is improper because of certain alleged *collateral* consequences to the environment which the employers claim may possibly be engendered by the commission's wage orders. Thus, for example, the em-

ployers attacking the IWC wage orders with respect to agricultural industries argue that "[t]he 1980 provisions with regard to hours and days of work are much more restrictive and financially more costly [than prior orders, and thus] may well have the effect of forcing employers to turn to mechanization or automation [which in turn] will result in the greater use of machines and fuel of all types and, therefore, may have a significant effect on the environment." In a similar vein, the growers contend that it is "likely that increased mechanization of agricultural operations will cause greater dust and noise pollution in areas adjacent to metropolitan centers" and also allege that "increased wages and overtime provisions will have the probable effect of increasing the sale of agricultural land to developers for urban purposes, thereby having an increasingly significant environmental impact."

Aside from the obvious speculation implicit in the employers' argument, it is not the IWC regulation of wages, hours and working conditions that, in the employers' scenario may significantly affect the environment, but rather it is the employers' own future actions, *not* called for by the wage orders, that may have such an effect. To the extent that such future actions by growers may adversely affect the environment, of course, the employers will be subject to regulation by a variety of state and federal environmental protection agencies. In any event, however, we think that the mere possibility that an employer may respond to the requirements of a wage order by adopting measures that may endanger the environment does not undermine the validity of the Secretary of Resources' conclusion that the IWC's promulgation of wage orders is categorically exempt from CEQA's requirements.

Accordingly, the IWC did not violate CEQA in adopting its 1980 wage orders.

5. *In the absence of a conflict with regulations promulgated by the California Occupational Health and Safety Standards Board, the IWC may adopt wage orders relating to the health or safety of employees.*

In addition to the various procedural contentions discussed above, the employers contend that the IWC exceeded its *substantive* authority in promulgating a number of the provisions included in all of the 1980 wage orders. In this regard, the employers initially focus on those sections of the wage orders which deal with matters generally relating to the health and safety of employees, e.g., provisions regulating meal periods (§ 11), rest periods (§ 12), seats (§ 14) and temperature (§ 15). The employers contend that under the current statutes only the California Occupational Safety and Health Standards Board (hereafter Cal/OSHA), formerly the Industrial Safety Board (see § 140, subd. (e)), has jurisdiction to act with respect to such matters and that, as a consequence, the IWC regulations in this field are null and void.

The employers' argument rests in principal part upon a portion of section 1173 that was added to the statute in 1973. The relevant paragraph reads: "Before adopting any new rules, regulations or policies, the commission shall consult with the Industrial Safety Board to determine those areas and subject matters where the respective jurisdiction of the commission and the Industrial Safety Board overlap. In the case of such overlapping jurisdiction, the Industrial Safety Board shall have exclusive jurisdiction, and rules, regulations, or policies of the commission on the same subject have no force or effect."

The employers argue that this provision precludes the commission from enacting regulations on any matter upon which the Industrial Safety Board, i.e., Cal/OSHA has the

authority or jurisdiction to act. Since, as the employers maintain, the governing statutes and judicial precedents clearly provide that Cal/OSHA has broad authority to act to protect workers' health and safety (see §§ 6305-6307; *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 312-313 [118 Cal.Rptr. 473, 530 P.2d 161]) the employer reasons that the IWC lacks any power to act in this field. The IWC, by contrast, asserts that while the 1973 amendment of section 1173 grants Cal/OSHA the "last word" on matters within its jurisdiction, the statute does not inhibit the IWC from acting to protect employees' health and safety in areas in which no conflict with Cal/OSHA regulations or policies actually exist.

In resolving this question of statutory interpretation, we begin with a brief historical review of the two agencies' overlapping jurisdiction in matters of employee health and safety. Since its inception as an entity charged with the regulation of wages, hours and working conditions of women and children, the IWC has been statutorily mandated "to investigate the comfort, health, safety, and welfare of such employees" and to fix wages, hours and working conditions so as to maintain and protect the "health and welfare" of such employees. (Stats. 1913, ch. 324, §§ 3, 6, pp. 633, 634-635.) From its earliest days, the commission's regulatory orders have contained numerous provisions aimed directly at preserving and promoting the health and safety of employees within its jurisdiction, and numerous decisions throughout the commission's existence have clearly recognized the validity of the commission's regulation of such matters. (See, e.g., *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 324-325 [19 Cal.Rptr. 492, 369 P.2d 20]; 2 Ops.Cal.Atty.Gen. 456 (1943); 6 Ops.Cal.Atty.Gen. 193, 194 (1945); 20 Ops.Cal.Atty.Gen. 120, 122 (1952).)

Despite its broad authority in this field, however, the IWC has never been the only state agency to regulate matters relating to the health and safety of California employees. In 1913, the year of the establishment of the IWC, the Legislature enacted a separate bill creating the Industrial Accident Commission, and vested that body, inter alia, with broad authority to adopt regulations relating to the safety and welfare of employees. (Stats. 1913, ch. 176, §§ 51-72, pp. 305-311.) Unlike the IWC, however, the Industrial Accident Commission's jurisdiction was not limited only to the protection of women or child workers, but encompassed the entire workforce. Subsequently, in 1945, the Industrial Accident Commission's broad authority to regulate safety in places of employment was transferred to a new body, the Industrial Safety Board. (Stats. 1945, ch. 1431, § 78, p. 2698.)

In view of the broad grant of authority in matters relating to occupational health and safety to both the IWC and the Industrial Safety Board, the question of overlapping jurisdiction of these two agencies has existed for many decades. Prior to 1973, however, no specific statutory provision attempted to reconcile this overlapping jurisdiction. In the absence of any such provision, the existing authorities determined that both of the agencies had "concurrent jurisdiction" over matters within their authority, and concluded that affected employers were required to comply with all applicable regulations of both agencies. (See, e.g., 20 Ops.Cal.Atty.Gen. 120, 122 (1952); 37 Ops.Cal.Atty.Gen. 31, 36 (1961); cf. *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, 951-954 [95 Cal.Rptr. 17, 484 P.2d 1361].) When more than one agency's regulations applied to a particular activity, the employer was obligated to comply with the most stringent regulation. (See 37 Ops.Cal.Atty.Gen. 31, 36 (1961.)

As already noted, in 1973 the Legislature enacted a bill expanding the IWC's jurisdiction to include all California employees, men, women and children. In the same bill, the Legislature added to section 1173 a paragraph specifically addressing the question of the overlapping jurisdiction of the IWC and the Industrial Safety Board. It is the interpretation of this provision upon which the present controversy turns.[13] To reiterate, the relevant paragraph of section 1173

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[13]Although the employers argue that a separate 1973 enactment (Stats. 1973, ch. 993, §§ 11, 16, pp. 1919-1920), which renamed the Industrial Safety Board the California Occupational Safety and Health Standards Board and which included a provision stating that such board "shall be the only agency in this state authorized to adopt occupational safety and health standards" (§ 142.3), was intended by the Legislature to give additional content to the 1973 amendment of section 1173, we think that that contention is belied both by the language of the section 1173 amendment and by its legislative history. As we have noted, the amendment of section 1173 refers to the "Industrial Safety Board" not the Occupational Safety and Health Standard Board and thus it is clear that, contrary to the employers' contention, the amendment of section 1173 was by no means a "companion" to the Cal/OSHA legislation. Second, as originally introduced, the paragraph of section 1173 in question provided that the *IWC*, rather than the Industrial Safety Board, would have "exclusive jurisdiction" in cases of conflict; although the position of the two agencies in the section 1173 paragraph was ultimately reversed, the legislation was not part of any comprehensive legislative design to give the newly constituted Cal/OSHA sole authority in this area.

Similarly, a review of Cal/OSHA legislation also suggests that the provisions of section 142.3 were not intended to effect the IWC's jurisdiction. Unlike section 1173, which specifically addresses the issue of the overlapping jurisdiction of the IWC and the Industrial Safety Board (Cal/OSHA), section 142.3 makes no reference to the IWC at all. Although that section provides that Cal/OSHA shall be the only agency to adopt "occupational safety and health standards," that terminology is a term of art specifically defined by the Cal/OSHA legislation (see § 6305, subd. (a)) and does not encompass wage orders promulgated by the IWC. Indeed, another provision of the Cal/OSHA legislation, section 144, subdivision (e), specifically provides that "[n]othing in this section shall affect or limit the authority of any state or local agency as to any matter other than the enforcement of occupational and health standards adopted by the board. . . ."

Since the Legislature specifically enacted the amendment to section 1173 to address the question of the overlapping jurisdiction of the IWC and the Industrial Safety Board (Cal/OSHA), we conclude that we must properly look to that statute to determine legislative intent as to the proper allocation of authority between the two agencies.

reads in full: "Before adopting any new rules, regulations or policies, the commission shall consult with the Industrial Safety Board to determine those areas and subject matters where the respective jurisdiction of the commission and the Industrial Safety Board overlap. In the case of such overlapping jurisdiction, the Industrial Safety Board shall have exclusive jurisdiction, and rules, regulations, or policies of the commission on the same subject have no force or effect."

The employers contend that this provision was intended to resolve the question of overlapping jurisdiction by entirely eliminating the power of the IWC to regulate on any matter over which the Industrial Safety Board (i.e., Cal/OSHA) has jurisdiction, i.e., all matters of occupational health and safety. The IWC contends that the Legislature had a more modest goal in mind and simply intended to provide that, *in cases of conflict,* the regulations or policies of the Industrial Safety Board would govern.

Viewed in isolation, the language of the paragraph in question is somewhat ambiguous. On the one hand, the paragraph's reference to the "exclusive jurisdiction" of the Industrial Board appears to support the employers' reading of the provision. On the other hand, however, the statutory requirement of consultation between the two agencies would be rather pointless if the IWC had absolutely no authority to act with respect to health and safety matters in any circumstances. Moreover, the concluding language of the paragraph, declaring that "rules, regulations or policies of the commission *on the same subject* have no force or effect," suggests that the Legislature may well have intended that IWC orders would be preempted only when the Industrial Safety Board, i.e., Cal/OSHA, has actually regulated on the same subject.

Although the paragraph at issue, standing alone, is thus arguably susceptible to either of the interpretations proffered by the parties, for a number of reasons we conclude that the construction suggested by the IWC is the more reasonable and should be adopted.

First, and most significantly, numerous other provisions of the 1973 bill in which the paragraph in question appears are entirely incompatible with the employers' proposed interpretation. (See Stats. 1973, ch. 1007, §§ 1.5, 2, 3, pp. 2002-2003.) To begin with, as reenacted in 1973, the first paragraph of section 1173, immediately preceding the paragraph relied upon by the employers, provides explicitly that "[i]t shall be the continuing duty of the Industrial Welfare Commission . . . to investigate the comfort, *health, safety* and welfare of . . . employees." (Italics added.) In addition, the 1973 legislation also explicitly retained the provisions of section 1178, declaring that "wage board[s] shall report and make recommendations to the commission, including therein: (a) An estimate of the minimum wage adequate to supply the necessary cost of proper living to, and *maintain the health* and welfare of employees . . .; (b) The number of hours of work per day . . . consistent with *the health* and welfare of employees; (c) The standard conditions of labor . . . demanded by *the health* and welfare of employees." Finally, the 1973 act, while revising section 1182 in several respects, reiterated the portion of that section authorizing the IWC to fix "the standard conditions of labor demanded by the *health* and welfare of the employees . . . in this state."

If the Legislature, by its 1973 enactments, had in fact intended to preclude the commission from acting with respect to matters of employee health and safety, as the employers suggest, it clearly would not have explicitly mandated the commission "to investigate the . . . health [and] safety of . . . employees" and would not have continued

to authorize the commission to establish "standard conditions of labor demanded by the health . . . of [such] employees." A cardinal principle of statutory construction, of course, decrees that all related statutory provisions must be read together and harmonized, if possible. (See, e.g., *Moyer* v. *Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230-231 [110 Cal.Rptr. 144, 514 P.2d 1224].) In this case, a reading of the 1973 enactment as a whole indicates that, contrary to the employers' contention, the Legislature contemplated that the IWC would retain authority to protect workers' health and safety, supporting the IWC's position that the statute simply requires the IWC to yield to the Industrial Safety Board (Cal/OSHA) in instances of actual conflict.

Second, the IWC's reading of the statute is supported by the fact that both of the administrative agencies charged with administering the legislation in question agree that this is the appropriate construction to be given the statutory language. Since the enactment of the 1973 legislation, the IWC and Cal/OSHA have consulted on numerous occasions pursuant to the provision of section 1173, and as a result of these consultations, the IWC has deleted from its wage orders a number of long-standing provisions on various subjects (e.g., protective garments and equipment, sanitary conditions of toilets and floors) over which Cal/OSHA has assumed jurisdiction. As the employers concede, however, throughout this period the officials of both Cal/OSHA and the IWC have taken the position that the IWC is not totally precluded from regulating on matters relating to worker health or safety, but may adopt such regulations so long as they do not conflict with applicable Cal/OSHA directives or policy. We have often said, of course, that "the construction of a statute by officials charged with its administration . . . is entitled to great weight" (*Morris* v. *Williams*

(1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697]) and this principle applies with particular strength when two agencies agree as to the interpretation of a statutory provision concerned with the allocation of authority between the agencies.

Finally, the interpretation of the statute urged by the IWC is sustained by the general principle of statutory interpretation, noted at the outset of this opinion, that remedial legislation of this nature is to be liberally construed in favor of accomplishing the principal objective of the legislation, i.e., protecting workers. Under the employers' interpretation of the statute, employees would be deprived of the benefits of health- and safety-related regulations of the IWC even though Cal/OSHA had not yet acted on the subject to protect the workers' interests. Such a construction is clearly at odds with the remedial purpose of the entire statutory framework.

Contrary to the employers' claim, the IWC's interpretation of the provision in no way deprives the relevant statutory provisions of section 1173 of all meaning. Unlike the situation prior to 1973, under the new statute employers need not comply with the most restrictive regulation when IWC and Cal/OSHA regulations collide; instead, the statute provides that in such a situation, the regulations promulgated by Cal/OSHA will prevail.

Accordingly, we conclude that IWC retains jurisdiction to regulate working conditions related to the health and safety of employees in the absence of any actual conflict with existing Cal/OSHA regulations or policy. Because the record establishes that no such conflict exists, we reject the employers' challenge to the orders' validity on this ground.

6. *Neither federal nor state labor relation legislation precludes the IWC from establishing minimum wages, maximum hours or standard conditions of employment to protect the health and welfare of California employees.*

A number of employers additionally contend that a variety of state and federal labor relation statutes, which have as a principal objective the resolution of employer-employee disputes over wages, hours and working conditions through the collective bargaining process, operate to "preempt" the IWC from "imposing" or "dictating," upon either employers or employees, conditions of employment that have not been arrived at through collective bargaining.[14] Relying upon a number of labor law decisions which have indicated in other contexts that neither the National Labor Relations Board nor similar state agencies may "impose [their] own views of a desirable settlement" in the event of a dispute over employment conditions (see, e.g., *Porter Co.* v. *NLRB* (1970) 397 U.S. 99, 103-104 [25 L.Ed.2d 146, 151, 90 S.Ct. 821]; *Machinists* v. *Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132, 153 [49 L.Ed.2d 396, 411, 96 S.Ct.

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[14]In the underlying mandate actions, the employers have raised this issue with respect to the provisions of the California Agricultural Labor Relations Act (ALRA) (§ 1140 et seq.) which guarantee collective bargaining rights in the agricultural sector. Because (1) the ALRA's provision in this regard were modeled upon the provisions of the National Labor Relations Act (NLRA) (see, e.g., *Vargas* v. *Municipal Court* (1978) 22 Cal.3d 902, 910-911 [150 Cal.Rptr. 918, 587 P.2d 714]), (2) many of the lawsuits challenging the 1976 orders raised an analogous issue with respect to the federal labor legislation, and (3) one of the issues specifically left open in *California Hotel & Motel Assn.* concerned the alleged preemptive effect of federal labor laws (25 Cal.3d at p. 205, fn. 2), we believe it is appropriate to analyze this issue with reference to both state and federal labor legislation. Although the employers have objected to the court's addressing and discussing the federal labor preemption issue in this proceeding, all parties were notified prior to oral argument of this court's intention to consider the issue, and both sides have filed briefs directed to this issue.

2548]), the employers maintain that the IWC lacks authority to "interfere" with the collective bargaining process by mandating minimum permissible employment conditions in matters that are "mandatory subjects" of collective bargaining under the applicable labor statutes.

Taken at face value, the employers' contentions in this regard would have the effect of precluding the IWC from regulating with respect to *any* of the matters within its jurisdiction. Under each of the labor statutes which apply to the industries regulated by the commission—the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.), the Railway Labor Act (RLA) (45 U.S.C. § 151 et seq.), and the Agricultural Labor Relations Act (ALRA) (§ 1140 et seq.)—"wages, hours and working conditions" constitute mandatory subjects of collective bargaining. Thus, if these labor statutes in fact prohibited all governmental regulation on any matter that is subject to employee-employer bargaining, neither the IWC nor any other state or federal agency would have authority to prescribe minimum wages or maximum hours, to promulgate occupational health and safety standards, or to prohibit discriminatory employment practices. The mere recitation of the logical consequences of the employers' arguments, of course, signals the extreme tenuousness of the employers' contention.

In fact, the fundamental flaw in the employers' present argument was fully exposed nearly 30 years ago by Justice Jackson in his opinion for the United States Supreme Court in *Terminal Assn. v. Trainmen* (1943) 318 U.S. 1 [87 L.Ed. 571, 63 S.Ct. 420]. In *Terminal,* an employer covered by the Railway Labor Act challenged the validity of a state agency regulation which, to protect the health and safety of employees, required the company to provide cabooses on designated railroad runs. The employer in *Terminal* pointed out that the state regulation conflicted with a specific

provision of a collective bargaining agreement that had been negotiated between the employer and employees, and argued that since the question of providing cabooses involved a working condition of the employment and thus was a "mandatory subject" of collective bargaining subject to resolution under the Railway Labor Act, state regulation on the subject was preempted by the act.

In *Terminal,* the Supreme Court unanimously rejected the employer's contention and upheld the validity of the state regulation. In reaching this conclusion, Justice Jackson explained: "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. . . .

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum

requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State . . . from making the order in question." (Fn. omitted.) (318 U.S. at pp. 6, 7 [87 L.Ed. at pp. 577-578].)

This reasoning, we believe, fully answers the employers' contention that federal or state labor legislation, fostering collective bargaining, can be read to preempt legislative efforts to prescribe minimum standards of wages, hours and working conditions for the protection of employees. Indeed, as already suggested, the numerous existing federal and state statutes embodying just such "minimum standards" stand as eloquent testimony to the validity of such regulation. Thus, notwithstanding the NLRA and the RLA, the federal government has enacted the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) prescribing minimum wages and maximum hours, and the Occupational Safety and Health Act of 1970 (federal OSHA) (29 U.S.C. § 651 et seq.), authorizing the promulgation of specific standards directly relating to workers' conditions of employment. Moreover, both the Fair Labor Standards Act and federal OSHA contain specific provisions which recognize the states' authority to go beyond the federal legislation in adopting more protective regulations for the benefit of employees. (29 U.S.C. § 218; 29 U.S.C. §§ 651 (b)(11), 667.)

Furthermore, although the employers argue that state regulation in this field—if permissible at all—must be confined only to matters of minimum wages, maximum hours or working conditions which directly implicate the health or safety of employees, federal and state legislation directed to discrimination in employment demonstrates that governmental entities retain broad authority to establish minimum standards related generally to the "welfare" of employees.

(See, e.g., 42 U.S.C. §§ 2000e-2, 2000e-7; Lab. Code; § 1410 et seq.)[15]

As the *Terminal* case teaches, the fact that these matters may also constitute proper, indeed "mandatory," subjects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table.[16]

[15]To the extent that the case of *United Air Lines v. Industrial Welfare Com.* (1963) 211 Cal.App.2d 729, 744 [28 Cal.Rptr. 238], supports the contention that state regulation of working conditions is invalid outside the realm of health and safety provisions, that decision is disapproved. Numerous legislative enactments and judicial authorities make it clear that the states possess broad authority, under their police power, to prescribe minimum standards of employer conduct found necessary to protect the *welfare* of employees, even when health or safety considerations are not directly implicated. (See, e.g., 42 U.S.C. § 2000e-7 (recognizing validity of state antidiscrimination provisions); 15 U.S.C. § 1677 (recognizing validity of state laws prohibiting discharge on basis of wage garnishments); Lab. Code, § 1101 et seq. (prohibiting employer interference with employees' political activities or affiliations); *De Canas* v. *Bica* (1976) 424 U.S. 351, 356 [47 L.Ed.2d 43, 49, 96 S.Ct. 933]; *Baltimore & O. R. Co.* v. *Commonwealth, Dept. of L. & I.* (1975) 461 Pa. 68 [334 A.2d 636, 643], app. dism. for want of substantial federal question, 423 U.S. 806 [46 L.Ed.2d 26, 96 S.Ct. 14].)

[16]The numerous labor law preemption decisions relied upon by the employers are clearly not in point. None of the decisions dealt with a state regulation prescribing a minimum standard for working conditions to protect the health, safety or welfare of employees. Instead, the cases involve either direct state interference with the collective bargaining process (see, e.g., *California* v. *Taylor* (1957) 353 U.S. 553 [1 L.Ed.2d 1034, 77 S.Ct. 1037]) or with the choice of economic weapons available during a labor dispute (see, e.g., *Machinists* v. *Wisconsin Emp. Rel. Comm'n. supra*, 427 U.S. 132), or the state's use of its antitrust laws to bar the collective action by employees or employers protected by federal law. (See, e.g., *Teamsters Union* v. *Oliver* (1959) 358 U.S. 283 [3 L.Ed.2d 312, 79 S.Ct. 297].) As the United States Supreme Court recently observed: "[A]lmost all of the Court's labor law decisions in which state regulatory schemes have been found to be preempted have involved state efforts to regulate or to prohibit private conduct that was either protected by § 7 [of the NLRA] prohibited by § 8 [of the NLRA], or at least arguably so protected or prohibited." (*New York Tel. Co.* v. *New York Labor Dept.* (1979) 440 U.S. 519, 529 [59 L.Ed.2d 553, 561-562, 99 S.Ct. 1328] (fns. omitted).)

(footnote continued on following page)

Accordingly, we conclude that existing federal and state labor statutes establish no bar to the IWC's promulgation of the 1980 wage orders. (See, e.g., *Rivera* v. *Division of Industrial Welfare, supra,* 265 Cal.App.2d 576, 602-604.)

7. *The employers' additional, individual challenges to specific provisions in various wage orders are without merit.*

Finally, in addition to raising the numerous common legal challenges to the 1980 wage orders discussed at length above, a number of employers have put forward a variety of more limited objections to specific provisions of one or more of the various 1980 wage orders. As we shall explain, we have also concluded that none of these additional contentions has merit.

(a) *Treatment of tipped employees in wage order 5-80.*

In the Kings County action (see fn. 2, *ante*), a number of employers argue that in enacting wage order 5-80, relating to the public housekeeping industry, the IWC abused its discretion in refusing to provide a lower minimum wage for tipped employees. The IWC explained the basis of its decision in the statement as to the basis for order 5-76 which it adopted upon remand of this court's decision in *California Hotel & Motel Assn.* The commission stated: "Many requests were received from the hotel and restaurant industry for a special, lower rate for tipped employees. The Commission carefully studied written and oral arguments on the

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Contrary to the employers' contention, the Supreme Court has never retreated from its holding in *Terminal,* quoted above, that the federal labor laws do not "preempt [ ] . . . the field of regulating working conditions. . . ." (318 U.S. at p. 7 [87 L.Ed.2d at p. 578]. See, e.g., *Malone* v. *White Motor Corp.* (1978) 435 U.S. 497, 504-505, 512 [55 L.Ed.2d 443, 450-451, 455, 98 S.Ct. 1185]; *Baltimore & O. R. Co.* v. *Commonwealth, Dept. of L. & I., supra,* 334 A.2d 636, app. dism. for want of a substantial federal question, 423 U.S. 806.)

matter. It denied the request, however, for two reasons. First, and most important, the Legislature specifically revoked the authority it had earlier given the IWC to allow credit for tips against the minimum wage, when it amended Section 351 of the Labor Code this year [i.e., 1975]. Second, the Commission noted from enforcement experience during the time that tip credit was allowed that tip sharing was required to such an extent that the traditional tipped employees were subsidizing the minimum wages of other classifications.''

The employers contend that the IWC has misinterpreted the effect of the 1975 amendment to section 351,[17] asserting that while the Legislature intended by such amendment to prohibit the IWC from allowing employers directly to deduct from an employee's wages tips that an employee actually receives, the Legislature did not intend to prohibit the commission itself from indirectly achieving a somewhat comparable result by establishing a lower minimum wage for tipped employees. Although the tip credit practice sanctioned by the IWC in the past may have engendered particular abuse because individual employers exacted credit from their employees on an individual basis, we think that the legislative history of the 1975 bill supports the IWC's conclusion that the Legislature contemplated that the enactment would insure that tips received by an employee would not reduce an employer's minimum wage obligation, either directly or indirectly.

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[17]Prior to 1975, section 351 provided in relevant part: ''No employer . . . shall . . . receive any gratuity or a part thereof, paid, given to or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity . . . *except to the extent that may be permitted by a valid regulation of the Industrial Welfare Commission*. . . .'' (Italics added.) In 1975, section 351 was amended to delete the italicized language of the statute.

For example, an analysis of the 1975 bill by the Senate Industrial Relations Committee specifically states: "The effect of this bill would be to require employers to pay employees at least the minimum wage regardless of the amount of tips the employees receive." Similarly, a memorandum on the legislation drafted by the Assembly Labor Relations Committee states in part: "The basis for this legislation would appear to be that tips or gratuities are given for individual excellence of service above and beyond the basic duties of employment, and as such, the employer has no vested right to consider tips a part of wages." In light of the legislative history, the IWC could reasonably interpret the amendment of section 351 as a legislative determination that all employees should be guaranteed a minimum wage that is not reduced by virtue of any tips an employee may possibly receive. As already noted, the commission's interpretation of the statutes which it administers is entitled to great weight, and, in our view, the employers have not demonstrated a sufficient basis for rejecting the commission's interpretation of this provision.

The employers additionally contend, however, that as interpreted by the commission, section 351 violates equal protection principles by creating an arbitrary distinction between tipped and nontipped employees. We do not agree. The Legislature could rationally determine (1) that, for minimum wage purposes, employers should not receive the benefits of gratuities that customers intend for the sole benefit of employees and (2) that employers should not be excused from the obligations of paying minimum wages to certain employees upon the uncertain possibility that such employees will in fact receive a predetermined amount of tips for their services. (See generally *Cal. Drive-in Restaurant Assn.* v. *Clark* (1943) 22 Cal.2d 287, 295-300 [140 P.2d 657, 147 A.L.R. 1028]; *Williams* v. *Terminal Co.*

(1942) 315 U.S. 386, 388-389 [86 L.Ed. 914, 920-921, 62 S.Ct. 659]; *id.*, at pp. 410-411 [86 L.Ed. at pp. 931-932] (Black, J. dis.).) Although the employers also claim that the absence of a lower minimum wage for tipped employees is arbitrary in light of the credits which employers are given for other "non-wage benefits," e.g., meals provided by the employer, there is an obvious distinction between the two categories of "non-wage benefits" in that the employer makes a direct out-of-pocket expenditure for meals and the like, whereas tips are paid by customers, not the employer.

Accordingly, we conclude that the minimum wage provisions of wage orders 5-80 are not invalid in failing to provide a differentiated minimum wage for tipped and non-tipped employees.

(b) *"Due process" challenge to orders 8-80, 13-80 and 14-80.*

In the Stanislaus County case, numerous agricultural employers contend that the 1980 wage orders regulating agricultural industries violate due process, asserting in conclusory terms that the orders impose such "inflexible overtime and work rules [that] many such employers will not be able to operate efficiently or economically [and] . . . will be forced out of business." The employers additionally contend that in evaluating the constitutionality of the wage order provisions, the judiciary should exercise de novo review because the regulation may deprive the growers of the right to practice a common occupation.

As the IWC suggests, the employers' contentions in this regard fly in the face of a long line of contrary authority. From at least as early as the United States Supreme Court decision in *West Coast Hotel Co.* v. *Parrish* (1937) 300 U.S. 379 [81 L.Ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330], sustaining the constitutionality of a state minimum wage

law in the face of a similar due process challenge, the cases have made clear that state regulations of minimum wages, maximum hours and working conditions come to the courts "freighted with [a] strong presumption of regularity" (*Ralphs Grocery Co.* v. *Reimel* (1968) 69 Cal.2d 172, 175 [70 Cal.Rptr. 407, 442 P.2d 79]) and are not subject to "de novo" judicial review. As the court emphasized in *West Coast Hotel:* " '[T]imes without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' " (300 U.S. at p. 398 [81 L.Ed. at p. 712].)

Moreover, the authorities similarly declare that the "legislative power" to regulate employment conditions is very broad indeed, even though such regulations almost inevitably impose some economic burden upon employers. Again, as the Supreme Court stated in *West Coast Hotel:* "In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." (*Id.*, at p. 393 [81 L.Ed. at p. 709].) The employers completely fail to show that the wage and hours regulations they attack are not rationally related to these permissible state interests.

Indeed, although the agricultural employers complain about the harshness of the wage orders applicable to their industry, the fact of the matter is that the wage order relating to agriculture appears to be particularly solicitous of the interests of agricultural employers in several respects. Thus, for example, wage order 14-80 provides for a longer work

week for agricultural employees (ten-hour day, six-day week) before the overtime premium applies, exempts growers from the requirement of providing specific places for meal periods, changing rooms or rest facilities, and imposes no temperature restrictions.

(c) *"Undue hardship".*

In a corollary to the above "due process" argument, the agricultural employers argue that orders 8-80, 13-80 and 14-80 are invalid because they impose an "undue hardship" on employers in violation of a provision of the 1973 legislation which reads: "It is the intent of the Legislature in enacting this act that the Industrial Welfare Commission interpret these provisions in a manner which does not cause undue hardship or loss of employment opportunities in any segment of industry in California." (Stats. 1973, ch. 1007, § 11, p. 2005.)

As already noted, however, the 1980 agricultural wage orders give full consideration to the interests of both *employees and employers,* and provide numerous exemptions—where the IWC found it appropriate—in recognition of the commission's responsibility to avoid "undue hardship" to all affected individuals. The statutory language to which the employers point makes it clear that the "undue hardship" provision was not intended to grant courts the prerogative of usurping the agency's quasi-legislative function; the statute directs the *IWC* to interpret the provision so as to forestall undue hardship. The employers fail to demonstrate that the commission failed to give heed to the guidance of this provision.

(d) *Alleged conflict with section 554.*

The agricultural employers additionally contend that section 3(A) of orders 8-80 and 13-80 conflict with section 554 and are invalid. Section 3(A)(1) of each of these orders

requires that employees in the covered industries be given a twenty-four hour period off after they have worked seventy-two hours in any seven-day period,[18] the employers contend that this requirement is inconsistent with the provisions of section 554 which exempt agricultural employees from section 551's statutory requirement of one day's rest in seven.[19]

The employers' contention rests upon a fundamental misconception of the relationship between the general statutory provisions of sections 510-556 and the more specific regulations embodied in IWC wage orders. Although section 1182 expressly provides that the maximum hours fixed by IWC wage orders "shall not *be more than* the maximum for employees in California" (italics added), the authorities have uniformly held that "the Industrial Welfare Orders may provide *more restrictive provisions* than are provided by [the general] statutes adopted by the Legislature on this subject [in sections 510-556]. . . ." (Italics added.) (2 Ops.Cal.Atty.Gen. 456, 457 (1943); accord *Cal. Drive-in Restaurant Assn.* v. *Clark, supra,* 22 Cal.2d 287, 290-294; cf. § 1356; *Rivera v. Division of Industrial Welfare, supra,* 265 Cal.App.2d 576, 599-601.) Thus, in the opinion cited above, the Attorney General rejected a contention, similar to that raised by the employers in the instant case, that the provisions of section 556—exempting certain employees from the statutory mandate of section 551—operated to pre-

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[18]Section 3(A)(1) reads in relevant part: "An employee may work up to a maximum of seventy-two (72) hours in any seven (7) consecutive days after which the employee shall have a twenty-four hour period off duty."

[19]Section 551 provides: "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven."

Section 554 provides in part: "This chapter shall not apply to any cases of emergency nor to work performed in the necessary care of animals, crops or agricultural lands . . . ."

clude the IWC from requiring employers to afford such employees one day's rest in seven. (2 Ops.Cal.Atty.Gen. 456, 458 (1943).)

Moreover, this conclusion is reinforced in the instant case by the fact that the sections of the 1980 wage orders challenged by the employers have been part of the wage orders of the industries in question since 1943. As the Court of Appeal noted in *Rivera* about a similar wage order provision: "This long-continued and consistent administrative interpretation has received at least silent acquiescence from the Legislature. It supports the interpretation that the statutory [provisions] . . : should not be construed to prevent it. The courts will not depart from such an administrative construction unless it is clearly erroneous or unauthorized." (Fn. omitted.) (265 Cal.App.2d 576, 601.)

(e) *Alleged conflict with section 1394, subdivision (a).*

Finally, the agricultural employers contend that section 3(c) of order 13-80, regulating the hours of employment of minors, conflicts with section 1394, subdivision (a) and is invalid. As the IWC's replication points out, however, the employer's argument rests entirely upon an outdated version of section 1394, subdivision (a) and completely ignores recent amendments to section 1394 and the enactment of section 1394.1. The employers have not demonstrated that the 1980 wage orders conflict with the currently prevailing statutes.

8. *Conclusion.*

We are aware of the vexation that the managements of many regulated corporations must feel as to the multiple controls an administrative society is compelled to impose upon them. Perhaps this extensive regulation is the price we pay for the very life of a society based upon the con-

glomerate and the mass producer. Yet the incidence of such control hopefully should not endanger the very continuance of those fundamental protections of the workers that trace back over a half century and that the Legislature and responsible administrative officials have determined to be necessary to the workers' welfare. The likely chagrin of the regulated should not obscure the underlying social need that prompts the regulation.

For the reasons discussed at length above, we conclude that none of the employers' challenges to the IWC's 1980 wage orders has merit.

Let a peremptory writ of mandate issue, directing the respondent courts (1) to vacate the orders previously issued staying the operation and effect of the challenged wage orders and (2) to enter judgment in favor of the commission in each of the underlying mandate actions.

Clark, J., Richardson, J., Manuel, J., Newman, J., Taylor, J.,* and Racanelli, J.,* concurred.

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*Assigned by the Chairperson of the Judicial Council.

APPENDIX B.

Notice of Appeal to the Supreme Court of the United States

In the Supreme Court of the State of California. Industrial Welfare Commission, et al., Petitioners, v. Kern County Superior Court, et al., Respondents, California Hotel & Motel Association, et al., Real Parties in Interest. No. S.F. 24123.

Filed: Aug. 4, 1980.

NOTICE IS HEREBY GIVEN that American Airlines, Inc., Sierra Ski Areas Association, California Trucking Association, California Manufacturers Association, Theatre Association of California, Theatre Properties, Inc., Hitchcock Transportation Co. and Corcoran Motor Transport, Real Parties in Interest above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered on July 10, 1980, ordering the issuance of a peremptory writ of mandate directing the Superior Courts above-named to vacate previously issued orders staying the operation and effect of challenged wage orders and to enter judgments in favor of petitioners above-named.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: August 4, 1980.

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Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California. Industrial Welfare Commission, et al., Petitioners, v. Kern County Superior Court, et al., Respondents, California Hotel & Motel Association, et al., Real Parties in Interest. No. S.F. 24123.

Filed: Aug. 5, 1980.

NOTICE IS HEREBY GIVEN that Real Party In Interest United Airlines, Inc., hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered on July 10, 1980, ordering the issuance of a peremptory writ of mandate directing the Superior Courts above-named to vacate previously issued orders and to enter judgments in favor of petitioners above-named.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: August 5, 1980.

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APPENDIX C.

Amended Notice of Appeal to the Supreme Court of the United States

In the Supreme Court of the State of California. Industrial Welfare Commission, et al., Petitioners, v. Kern County Superior Court, et al., Respondents, California Hotel & Motel Association, et al., Real Parties in Interest. No. S.F. 24123.

NOTICE IS HEREBY GIVEN that United Air Lines, Inc., American Airlines, Inc., Sierra Ski Areas Association, California Trucking Association, California Manufacturers Association, Theatre Association of California, Theatre Properties, Inc., Hitchcock Transportation Co. and Corcoran Motor Transport, Real Parties in Interest above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered on August 28, 1980, ordering the issuance of a peremptory writ of mandate directing the Superior Courts above-named to vacate previously issued orders staying the operation and effect of challenged wage orders to enter judgments in favor of petitioners above-named.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: September 3, 1980.

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APPENDIX D.

Order 1-80.

Article 7. Manufacturing Industry

(Order No. 1-80, Effective January 1, 1980)

11180. Order Governing Wages, Hours, and Working Conditions in the Manufacturing Industry.

1. Applicability of Order. This Order shall apply to all persons employed in the manufacturing industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Section 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Manufacturing Industry" means any industry, business, or establishment operated for the purpose of preparing, producing, making, altering, repairing, finishing, processing, inspecting, handling, assembling, wrapping, bottling, or packaging goods, articles, or commodities, in whole or in part; EXCEPT when such activities are covered by Orders in the: Canning, Preserving, and Freezing Industry; Industries Handling Products After Harvest; Industries Preparing Agricultural Products for Market, on the Farm; or Motion Picture Industry.

(D) "Employ" means to engage, suffer, or permit to work.

(E) "Employee" means any person employed by an employer.

(F) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(G) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(H) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(I) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place

of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(J) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(K) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(L) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teaching Preparation and Licensing or teaching in an accredited college or university.

(M) "Wages" means all amounts paid for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.

(N) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(O) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over nor any minor permitted to work as an adult as provided in (C) (1) shall be employed more than eight (8) hours in any one workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any one workday or more than six (6) days in any one workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that workday;

(3) Any employee on such a schedule who is required or permitted to work more than four (4) workdays shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the first eight (8) hours on such additional workdays and double the employee's regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship the Division may grant an extension of the time for compliance.

(C) No minor shall be employed more than eight (8) hours in any workday or more than six (6) days in any workweek. One and one-half (1½) times the minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek. No minor shall be employed before 5 o'clock in the morning or after 10 o'clock in the evening, except that during any evening preceding a non-school day a minor may work the hours authorized by this section until 12:30 o'clock in the morning of such non-school day.

(1) Notwithstanding the preceding provisions of this subsection, minors sixteen (16) and seventeen (17) years old who are not required by law to attend school may be employed for the same hours as an adult. Minors so permitted to work shall be subject to subsection (A) or (B) above.

(D) Minors sixteen (16) and seventeen (17) years of age who are enrolled in work experience education programs approved by the State Department of Education or in work experience education programs conducted by private schools may work after 10 p.m. but not later than 12:30 a.m. providing such employment is not detrimental to the health, education or welfare of the minor and the approval of the parent and the work experience coordinator has been obtained. However, any such minor who works any time during the hours from 10 p.m. to 12:30 a.m. shall be paid for

work during that time at a rate which is not less than the minimum wage required for adults.

VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) Except as provided in subsections (C), (D), and (F), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employees of not less than one dollar ($1.00) per hour more than the minimum wage.

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code, Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than three dollars and ten cents ($3.10) per hour for all hours worked, effective January 1, 1980, and three

dollars and thirty-five cents ($3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

NOTE: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2(b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such license shall be granted only upon joint application

of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula

shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term ''uniform'' includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. NO deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging. (A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for fulltime occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1980	*Effective January 1, 1981*
Room occupied alone	$15.00 per week	$16.00 per week
Room shared	$12.00 per week	$13.00 per week
Apartment—two-thirds (⅔) of the ordinary rental value, and in no event more than	$175.00 per month	$190.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$260.00 per month	$280.00 per month
Meals:		
Breakfast	$1.10	$1.20
Lunch	$1.55	$1.65
Dinner	$2.05	$2.20

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters

owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required for their work clothing during nonworking hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

16. Elevators. Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports. Every employer shall furnish to the Commission and to the Division at all reasonable times

any and all reports for information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

19. Inspection. The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all relevant records and to question all employees for such purposes.

The investigations and data gathering shall be conducted in a reasonable manner calculated to provide the necessary surveillance of employment practices and the enforcement of the Commission's orders.

20. Penalties. Failure, refusal, or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California and is punishable by fine or imprisonment or both.

(See excerpts from Labor Code, Section 1199.)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this imprac-

tical, every employer shall keep a copy of this Order and make it available to every employee upon request.

NOTE: Authority cited: Division 2, Part 4, Chapter 1, Labor Code and Sections 1171-1204 Labor Code, Issuing agency: Industrial Welfare Commission.

HISTORY:

1. Amendment filed 10-7-76; designated effective 10-18-76 (Register 76, No. 41). Industrial Welfare Commission Order No. 1-76. For prior history, see Register 68, No. 36.

2. Amendment filed 12-31-79; designated effective 1-1-80 (Register 80, No. 1). Industrial Welfare Commission Order No. 1-80.

Order 3-80.

Article 4. Canning, Freezing, and Preserving Industry
(Order No. 3-80, Effective January 1, 1980)

11075. Order Governing Wages, Hours, and Working Conditions in the Canning, Freezing, and Preserving Industry.

1. Applicability of Order. This Order shall apply to all persons employed in the canning, freezing, and preserving industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Canning, Freezing, and Preserving Industry" means any industry, business, or establishment operated for the purpose of canning soups, or of cooking, canning, curing, freezing, pickling, salting, bottling, preserving, or otherwise processing any fruits or vegetables, sea food, meat, poultry or rabbit product, when the purpose of such processing is the preservation of the product and includes all operations incidental thereto.

(D) "Employ" means to engage, suffer, or permit to work.

(E) "Employee" means any person employed by an employer.

(F) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(G) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(H) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(I) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(J) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(K) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(L) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teaching Preparation and Licensing or teaching in an accredited college or university.

(M) "Wages" means all amounts paid for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.

(N) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(O) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over nor any minor permitted to work as an adult as provided in (C) (1) shall be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible under the following conditions:

(1) An employee may work up to a maximum of seventy-two (72) hours in seven (7) consecutive days after

which the employee shall have a twenty-four (24) hour period off duty. Overtime hours shall be compensated at:

(a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(b) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workday;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that workday;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) workdays shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the first eight (8) hours on such additional workdays and double

the employee's regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of the time for compliance.

(C) No minor shall be employed more than eight (8) hours in any workday or more than six (6) days in any workweek. One and one-half (1½) times the minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek. No minor shall be employed before 5 o'clock in the morning or after 10 o'clock in the evening, except that during any evening preceding a non-school day a minor may work the hours authorized by this section until 12:30 o'clock in the morning of such non-school day.

(1) Notwithstanding the preceding provisions of this subsection, minors sixteen (16) and seventeen (17) years old who are not required by law to attend school may be employed for the same hours as an adult. Minors so permitted to work shall be subject to subsection (A) or (B) above.

(D) Minors sixteen (16) and seventeen (17) years of age who are enrolled in work experience education programs approved by the State Department of Education or in work experience education programs conducted by private schools may work after 10 p.m. but not later than 12:30 a.m. providing such employment is not detrimental to the health, education or welfare of the minors and the approval of the parent and the work experience coordinator has been ob-

tained. However, any such minor who works any time during the hours from 10 p.m. to 12:30 a.m., shall be paid for work during that time at a rate which is not less than the minimum wage required for adults.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors. Employers should ask school districts about required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If, during any workday an employer declares a work recess of one-half (½) hour or more, other than a meal period, and the employer notifies the employees of the time to report back for work and permits them to leave the premises, such recess need not be treated as hours worked provided that there shall not be more than two (2) such recess periods within one shift and the total duration does not exceed two (2) hours. Work stoppages of less than one-half (½) hour may not be deducted from hours worked.

(G) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal

Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code, Subchapter 6.5, Sec. 1200 and following sections, regulating hours of drivers.

(I) Except as provided in subsections (C), (D), and (G), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than three dollars and ten cents ($3.10) per hour for all hours worked, effective January 1, 1980, and three dollars and thirty-five cents ($3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

NOTE: under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2(b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, and there is a failure in the public utilities or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer; provided, all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term ''uniform'' includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deductions shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1980	*Effective January 1, 1981*
Room occupied alone	$15.00 per week	$16.00 per week
Room shared	$12.00 per week	$13.00 per week
Apartment—two-thirds (⅔) of the ordinary rental value, and in no event more than	$175.00 per month	$190.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$260.00 per month	$280.00 per month
Meals:		
Breakfast	$1.10	$1.20
Lunch	$1.55	$1.65
Dinner	$2.05	$2.20

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods.

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily

at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be

placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more, above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and

would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employees and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports. Every employer shall furnish to the Commission and to the Division at all reasonable times any and all reports or information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

19. Inspection. The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all relevant records and to question all employees for such purposes.

The investigations and data gathering shall be conducted in a reasonable manner calculated to provide the necessary surveillance of employment practices and the enforcement of the Commission's orders.

20. Penalties. Failure, refusal, or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California and is punishable by fine or imprisonment or both.

(See excerpts from Labor Code, Section 1199.)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

NOTE: Authority cited: Division 2, Part 4, Chapter 1, Labor Code and Sections 1171-1204, Labor Code. Issuing Agency: Industrial Welfare Commission.

HISTORY:

1. Amendment filed 10-7-76; designated effective 10-18-76 (Register 76, No. 41). Industrial Welfare Commission Order No. 3-76. For prior history, see Register 68, No. 36.

2. Amendment filed 12-31-79; designated effective 1-1-80 (Register 80, No. 1). Industrial Welfare Commission Order No. 3-80.

Order 4-80.

Article 12. Professional, Technical, Clerical, Mechanical, and Similar Occupations

(Order No. 4-80, Effective January 1, 1980)

11345. Order Governing Wages, Hours, and Working Conditions in Professional, Technical, Clerical, and Similar Occupations.

1. Applicability of Order. This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semi-professional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants, agents, appraisers, artists; attendants; audio-visual technicians; bookkeepers, bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related

occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(L) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate

from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" means all amounts paid for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over nor any minor permitted to work as an adult as provided in (D) (1) shall be employed more than eight (8) hours in any one workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that work day;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) workdays shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the first eight (8) hours on such additional workdays and double the employee's regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of the time for compliance.

(C) Provisions of subsections (A) and (B) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage if more than half (½) of that employee's compensation represents commissions.

(D) No minor shall be employed more than eight (8) hours in any workday or more than six (6) days in any workweek. One and one-half (1½) times the minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek. No minor shall be employed before 5 o'clock in the morning or after 10 o'clock in the evening, except that during any evening preceding a non-school day a minor may work the hours authorized by this section until 12:30 o'clock in the morning of such non-school day.

(1) Notwithstanding the preceding provisions of this subsection, minors sixteen (16) and seventeen (17) years old who are not required by law to attend school may be employed for the same hours as an adult. Minors so permitted to work shall be subject to subsections (A) or (B) above.

(E) Minors sixteen (16) and seventeen (17) years of age who are enrolled in work experience education programs approved by the State Department of Education or in work experience education programs conducted by private schools may work after 10 p.m. but not later than 12:30 a.m. providing such employment is not detrimental to the health, education or welfare of the minors and the approval of the parent and the work experience coordinator has been obtained. However, any such minor who works any time during the hours from 10 p.m. to 12:30 a.m. shall be paid for work during that time at a rate which is not less than the minimum wage required for adults.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(F) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(G) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(H) Except as provided in subsections (D), (E), (G) and (J), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(I) The provisions of this section are not applicable to (1) employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code, Subchapter 6.5, section 1200 and following sections, regulating hours of drivers.

(J) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in Section 2(D).

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than three dollars and ten cents ($3.10) per hour for all hours worked, effective January 1, 1980, and three dollars and thirty-five cents ($3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel, provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

NOTE: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2(b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage.

Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula

shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1980	*Effective January 1, 1981*
Room occupied alone	$15.00 per week	$16.00 per week
Room shared	$12.00 per week	$13.00 per week
Apartment—two-thirds (⅔) of the ordinary rental value, and in no event more than	$175.00 per month	$190.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value and in no event more than	$260.00 per month	$280.00 per month
Meals:		
Breakfast	$1.10	$1.20
Lunch	$1.55	$1.65
Dinner	$2.05	$2.20

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters

owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work

clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevators, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment of the time the application is filed with the Division.

18. Filing Reports. Every employer shall furnish to the Commission and to the Division at all reasonable times any and all reports or information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

19. Inspection. The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all relevant records and to question all employees for such purposes.

The investigations and data gathering shall be conducted in a reasonable manner calculated to provide the necessary

surveillance of employment practices and the enforcement of the commission's orders.

20. Penalties. Failure, refusal, or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California and is punishable by fine or imprisonment or both.

(See excerpts from Labor Code, Section 1199.)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

NOTE: Authority cited: Division 2, Part 4, Chapter 1, Labor Code, and Sections 1174-1204, Labor Code. Issuing agency: Industrial Welfare Commission.

HISTORY:

1. Amendment filed 10-7-76; designated effective 10-16-76 (Register 76, No. 41). Industrial Welfare Commission Order No. 4-76. For prior history, see Register 68, No. 36.

2. Amendment filed 12-31-79; designated effective 1-1-80 (Register 80, No. 1). Industrial Welfare Commission Order No. 4-80.

Order 8-80.

Article 5. Industries Handling Products After Harvest
(Order No. 8-80, Effective January 1, 1980)

11110. Order Governing Wages, Hours, and Working Conditions in the Industries Handling Products After Harvest.

1. Applicability of Order. This Order shall apply to all persons employed in the industries handling products after harvest whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Industries Handling Products After Harvest" means any industry, business, or establishment operated for the purpose of grading, sorting, cleaning, drying, cooling, icing, packing, dehydrating, cracking, shelling, candling, separating, slaughtering, picking, plucking, shucking, pasteurizing, fermenting, ripening, molding, or otherwise preparing any agricultural, horticultural, egg, poultry, meat, seafood, rabbit, or dairy product for distribution, and includes all the operations incidental thereto.

(D) "Employ" means to engage, suffer, or permit to work.

(E) "Employee" means any person employed by an employer.

(F) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person.

(G) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(H) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(I) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place

of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(J) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(K) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(L) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teaching Preparation and Licensing.

(M) "Wages" means all amounts paid for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task piece, commission basis or other method of calculation.

(N) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(O) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over nor any minor permitted to work as an adult as provided in (C)(1) shall be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any one workweek is permissible under the following conditions:

(1) An employee may work up to a maximum of seventy-two (72) hours in any seven (7) consecutive days after which the employee shall have a twenty-four (24) hour period off duty. Overtime hours shall be compensated at:

(a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday and for the first (8) hours worked on the seventh (7th) day of work.

(b) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that workday;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) days shall be compensated at the rate of not less than one and one-half

(1½) times the employee's regular rate of pay for the first eight (8) hours on such additional workdays and double the employee's regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of the time for compliance.

(C) No minor shall be employed more than eight (8) hours in any workday or more than six (6) days in any workweek. One and one-half (1½) times the minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek. No minor shall be employed before 5 o'clock in the morning or after 10 o'clock in the evening, except that during any evening preceding a non-school day a minor may work the hours authorized by this section until 12:30 o'clock in the morning of such non-school day.

(1) Notwithstanding the preceding provisions of this subsection, minors sixteen (16) and seventeen (17) years old who are not required by law to attend school may be employed for the same hours as an adult. Minors so permitted to work shall be subject to subsection (A) or (B) above.

(D) Minors sixteen (16) and seventeen (17) years of age who are enrolled in work experience education programs approved by the State Department of Education or in work experience education programs conducted by private schools may work after 10 p.m. but not later than 12:30 a.m. providing such employment is not detrimental to the health,

education or welfare of the minors and the approval of the parent and the work experience coordinator has been obtained. However, any such minor who works any time during the hours from 10 p.m. to 12:30 a.m. shall be paid for work during that time at a rate which is not less than the minimum wage required for adults.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors. Employers should ask school districts about required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If, during any workday an employer declares a work recess of one-half (½) hour or more, other than a meal period, and the employer notifies the employees of the time to report back for work and permits them to leave the premises, such recess need not be treated as hours worked provided that there shall not be more than two (2) such recess periods within one shift and the total duration does not exceed two (2) hours. Work stoppages of less than one-half (½) hour may not be deducted from hours worked.

(G) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code, Subchapter 6.5, Section 1200 and following sections regulating hours of drivers.

(I) Except as provided in subsections (C), (D), and (G), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than three dollars and ten cents ($3.10) per hour for all hours worked, effective January 1, 1980, and three dollars and thirty-five cents ($3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%)

limitation on the employment of minors shall not apply during school vacations.

(3) Minors sixteen (16) and seventeen (17) years old must be paid the minimum wage for all hours worked within any workweek during which they work overtime.

NOTE: Under certain conditions, the full minimum wage may be required for minors under 16 years of age. See Labor Code 1391.2 (b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any workday, and is furnished less than two hours of work on the second reporting, said employee shall

be paid for two hours at the employee's regular rate of pay, which shall be not less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property, or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee either as a detachable part of the check, draft or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer; provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage or loss is caused by a dishonest or willful act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such

tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and(B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for fulltime occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's

minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1980	*Effective January 1, 1981*
Room occupied alone	$15.00 per week	$16.00 per week
Room shared	$12.00 per week	$13.00 per week
Apartment—two-thirds (⅔) of the ordinary rental value, and in no event more than	$175.00 per month	$190.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$260.00 per month	$280.00 per month
Meals:		
Breakfast	$1.10	$1.20
Lunch	$1.55	$1.65
Dinner	$2.05	$2.20

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall

be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during nonworking hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevator, escalator or similar service consistent with industrywide standards for the nature of the process and the work performed shall be provided

when employees are employed four floors or more above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is file with the Division.

18. Filing Reports. Every employer shall furnish to the Commission and to the Division at all reasonable times any and all reports or information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

19. Inspection. The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all relevant records and to question all employees for such purposes.

The investigations and data gathering shall be conducted in a reasonable manner calculated to provide the necessary

surveillance of employment practices and the enforcement of the Commission's orders.

20. Penalties. Failure, refusal, or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California and is punishable by fine or imprisonment or both.

(See excerpts from Labor Code, Section 1199.)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

NOTE: Authority cited: Division 2, Part 4, Chapter 1, Labor Code and Sections 1171-1204, Labor Code. Issuing agency: Industrial Welfare Commission.

HISTORY:

1. Amendment filed 10-7-76; designated effective 10-18-76 (Register 76, No. 41). Industrial Welfare Commission Order No. 8-76. For prior history, see Register 68, No. 36.

2. Amendment filed 12-31-79; designated effective 1-1-80 (Register 80, No. 1). Industrial Welfare Commission Order No. 8-80.

Order 9-80.

Article 15. Transportation Industry
(Order No. 9-80, Effective January 1, 1980)

11460. Order Governing Wages, Hours, and Working Conditions in the Transportation Industry.

1. Applicability of Order. This Order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(D) Except as provided in Sections 4, 10, 11, 12, and 20 through 22, this Order shall not be deemed to cover those employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act, 42 U.S.C. sections 151 et seq.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Transportation Industry" means any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.

(D) "Employ" means to engage, suffer, or permit to work.

(E) "Employee" means any person employed by an employer.

(F) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over wages, hours, or working conditions of any person.

(G) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(H) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(I) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(J) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(K) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(L) "Teaching" means, for the purpose of Section 1 of the Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing.

(M) "Wages" means all amounts paid for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.

(N) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(O) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over nor any minor permitted to work as an adult as provided in (C) (1) shall be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond

eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime of not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that workday;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) workdays shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the

first eight (8) hours on such additional workdays and double the employee's regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship the Division may grant an extension of the time for compliance.

(C) No minor shall be employed more than eight (8) hours in any workday or more than six (6) days in any workweek. One and one-half (1½) times the minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek. No minor shall be employed before 5 o'clock in the morning or after 10 o'clock in the evening, except that during any evening preceding a non-school day a minor may work the hours authorized by this section until 12:30 o'clock in the morning of such non-school day.

(1) Notwithstanding the preceding provisions of this subsection, minors sixteen (16) and seventeen (17) years old who are not required by law to attend school may be employed for the same hours as an adult. Minors so permitted to work shall be subject to subsection (A) or (B) above.

(D) Minors sixteen (16) and seventeen (17) years of age who are enrolled in work experience education programs approved by the State Department of Education or in work experience education programs conducted by private schools may work after 10 p.m. but not later than 12:30 a.m. providing such employment is not detrimental to the health, education or welfare of the minors and the approval of the

parent and the work experience coordinator has been obtained. However, any such minor who works during the hours from 10 p.m. to 12:30 a.m. shall be paid for work during that time at a rate which is not less than the minimum wage required for adults.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) Except as provided in subsections (C), (D) and (F), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(H) The daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide

adequate dormitory and kitchen facilities for employees on such a schedule.

(I) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

(J) The provisions of this section shall not apply to taxicab drivers.

(K) The provisions of this section shall not apply where any employee of an airline certificated by the federal or state government works over forty (40) hours but not more than sixty (60) hours in a workweek due to a temporary modification in the employee's normal work schedule not required by the employer but arranged at the request of the employee, including but not limited to situations where the employee requests a change in days off or trades days off with another employee.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than three dollars and ten cents ($3.10) per hour for all hours worked, effective January 1, 1980, and three dollars and thirty-five cents ($3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

NOTE: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2(b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name

of the employee or the employee's social security number; and (4) the name of the employer; provided, all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for fulltime occupancy which are adequate,

decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1980	*Effective January 1, 1981*
Room occupied alone	$15.00 per week	$16.00 per week
Room shared	$12.00 per week	$13.00 per week
Apartment—two-thirds (⅔) of the ordinary rental value, and in no event more than	$175.00 per month	$190.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$260.00 per month	$280.00 per month
Meals:		
Breakfast	$1.10	$1.20
Lunch	$1.55	$1.65
Dinner	$2.05	$2.20

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work

period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during nonworking hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These

rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean and sanitary.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area, and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports. Every employer shall furnish to the Commission and to the Division at all reasonable times any and all reports for information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

19. Inspection. The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all relevant records and to question all employees for such purposes.

The investigations and data gathering shall be conducted in a reasonable manner calculated to provide the necessary surveillance of employment practices and the enforcement of the Commission's orders.

20. Penalties. Failure, refusal, or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California and is punishable by fine or imprisonment or both.

(See excerpts from Labor Code, Section 1199.)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

NOTE: Authority cited: Division 2, Part 4, Chapter 1, Labor Code, and Sections 1171-1204, Labor Code. Issuing agency: Industrial Welfare Commission.

HISTORY:

1. Amendment filed 10-7-76; designated effective 10-18-76 (Register 76, No. 41). Industrial Welfare Commission Order No. 9-76. For prior history, see Register 68, No. 36.

2. Amendment filed 12-31-79; designated effective 1-1-80 (Register 80, No. 1). Industrial Welfare Commission Order No. 9-80.

Order 10-80.

Article 3. Amusement and Recreation Industry
(Order No. 10-80, Effective January 1, 1980)

11040. Order Governing Wages, Hours, and Working Conditions in the Amusement and Recreation Industry.

1. Applicability of Order. This Order shall apply to all persons employed in the amusement and recreation industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(D) The provisions of Sections 3 and 4 of this Order shall not apply to full-time ride operators employed by travelling carnivals.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Amusement and Recreation Industry" means any industry, business, or establishment operated for the purpose of furnishing entertainment or recreation to the public, including but not limited to theaters, dance halls, bowling alleys, billiard parlors, skating rinks, riding academies, race tracks, amusement parks, athletic fields, swimming pools, gymnasiums, golf courses, tennis courts, carnivals, and wired music studios.

(D) "Employ" means to engage, suffer, or permit to work.

(E) "Employee" means any person employed by an employer.

(F) "Employer" means any person, as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(G) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(H) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(I) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(J) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(K) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(L) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing.

(M) "Wages" means all amounts paid for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.

(N) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(O) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over nor any minor permitted to work as an adult as provided in (c) (1) shall be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond

eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that workday;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) days shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the first

eight (8) hours on such additional workdays and double the employee's regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension time for compliance.

(C) No minor shall be employed more than eight (8) hours in any workday or more than six (6) days in any workweek. One and one-half (1½) times the minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek. No minor shall be employed before 5 o'clock in the morning or after 10 o'clock in the evening, except that during any evening preceding a non-school day a minor may work the hours authorized by this section until 12:30 o'clock in the morning of such non-school day.

(1) Notwithstanding the preceding provisions of this subsection, minors sixteen (16) and seventeen (17) years old who are not required by law to attend school may be employed for the same hours as an adult. Minors so permitted to work shall be subject to subsections (A) and (B) above.

(D) Minors sixteen (16) and seventeen (17) years of age who are enrolled in work experience education programs approved by the State Department of Education or in work experience education programs conducted by private schools may work after 10 p.m. but not later than 12:30 a.m. providing such employment is not detrimental to the health, education, or welfare of the minor and the approval of the

parent and the work experience coordinator has been obtained. However, any such minor who works during the hours from 10 p.m. to 12:30 a.m. shall be paid for work during that time at a rate which is not less than the minimum wage required for adults.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors. Employers should ask school districts about required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) The provisions of this section shall not apply to employees whose duties are exclusively those of a motion picture projectionist.

(H) Except as provided in subsections (C), (D), and (F), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(I) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the

United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) by Title 13 of the California Administrative Code, Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than three dollars and ten cents ($3.10) per hour for all hours worked, effective January 1, 1980, and three dollars and thirty-five cents ($3.35) per hour for all hours worked, effective January 1, 1981, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage, rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

NOTE: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2 (b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll

period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property, or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such license shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer; provided, all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the

shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (b) shall not apply to apprentices regularly indentured under the State Divison of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such

deposits shall be made pursuant to Section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent and sanitary, according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1980	*Effective January 1, 1981*
Room occupied alone	$15.00 per week	$16.00 per week
Room shared	$12.00 per week	$13.00 per week
Apartment—two-thirds (⅔) of the ordinary rental value, and in no event more than	$175.00 per month	$190.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$260.00 per month	$280.00 per month
Meals		
Breakfast	$1.10	$1.20
Lunch	$1.55	$1.65
Dinner	$2.05	$2.20

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor for lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during nonworking hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean and sanitary.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area, and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more, above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be

revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports. Every employer shall furnish to the Commission and to the Division at all reasonable times any and all reports or information which may be required to carry out the purpose of this Order, such reports and information to be verified if and when so requested.

19. Inspection. The Commission and duly authorized representatives of the Division shall be allowed free access to any office or establishment covered by this Order to investigate and gather data regarding wages, hours, working conditions, and employment practices, and shall be permitted to inspect and make excerpts from any and all relevant records and to question all employees for such purposes.

The investigations and data gathering shall be conducted in a reasonable manner calculated to provide the necessary surveillance of employment practices and the enforcement of the Commission's orders.

20. Penalties. Failure, refusal, or neglect to comply with any of the provisions of this Order is a violation of the Labor Code of the State of California and is punishable by fine or imprisonment or both.

See excerpts from Labor Code, Section 1199.

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or pro-

hibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

NOTE: Authority cited: Division 2, Part 4, Chapter 1, Labor Code and Sections 1171-1204, Labor Code. Issuing agency: Industrial Welfare Commission.

HISTORY:

1. Amendment of subsections 3(b) and 4(a) (2) filed 2-28-68; designated effective 5-1-68 (Register 68, No. 9). For prior history, see Register 67, No. 45.

2. Amendment filed 10-7-76; designated effective 10-18-76 (Register 76, No. 41). Industrial Welfare Commission Order No. 10-76.

3. Amendment filed 12-31-79; designated effective 1-1-80 (Register 80, No. 1). Industrial Welfare Commission Order No. 10-80.

APPENDIX E.

Stipulation and Order.

Superior Court of the State of California, for the County of Orange. California Manufacturers Association, a California corporation, Petitioner v. Industrial Welfare Commission of the State of California; James L. Quillin, Chief of Division of Labor Standards Enforcement, Respondents. Case No. 32-58-66.

FILED: Jan. 16, 1980.

The parties to the instant proceeding, the California Manufacturers Association, Petitioner, and the Industrial Welfare Commission of the State of California and James L. Quillin, Chief of Division of Labor Standards Enforcement, Respondents, through their respective attorneys, the undersigned hereby stipulate as follows:

1. The hearing presently scheduled for January 17, 1980 at 9:30 a.m. in Department 23 of the Orange County Superior Court shall be continued to February 22, 1980, at 9:30 a.m., in Department 23 of the Orange County Superior Court.

2. That pending a trial court hearing on the petition for writ of mandate and the complaint for injunctive and declaratory relief, the Respondents are stayed from enforcing, giving effect to or taking any action to enforce or give effect to the following sections of the Industrial Welfare Commission Wages, Hours and Working Conditions Orders 1-80, 3-80, 4-80 and 8-80 as against the members of the California Manufacturers Association:

Article 3(A) and (B). Provided, however, that this article is not stayed as to that provision which requires an employer to pay time and one-half the regular rate of hours in excess of 40 hours per week.

Article 5; Article 7; Article 8; Article 9 (A) and (B); Article 11 (A) and (B); Article 12; Article 13; Article 14; Article 15 and Article 16.

3. Provided, however, that any rights of employees which may have existed or been in effect on December 20, 1979, are not affected by this order and shall continue to control and be operative. This order is intended to, and shall be interpreted as, preserving the status quo as to those matters herein stayed, as they existed prior to December 20, 1979.

DATED: January 15, 1980.

GIBSON, DUNN & CRUTCHER
WILLARD Z. CARR, JR.
KENNETH E. RISTAU, JR.
DENNIS A. GLADWELL
MARK WM. SHURTLEFF

By /s/ DENNIS A. GLADWELL,
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Attorneys for Petitioner

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GEORGE "DUKE" DEUKMEJIAN
JOSEPH M. O'HERON,
Deputy Attorney General

By /s/ JOSEPH M. O'HERON,
Joseph M. O'Heron

Attorneys for Respondents
Deputy Attorney Generai

ORDER.

It is so ordered.

Dated: Jan 15 1980.

Judge, Orange County Superior Court.

APPENDIX F.

[Letterhead]

April 21, 1980

All Counsel: Re: S.F. 24123 — Industrial Welfare Commission v. Superior Court, County of Kern. S.F. 24140 — Hitchcock Transportation Company v. Industrial Welfare Commission.

Dear Counsel:

Enclosed please find a copy of the order filed this date.

The court has requested that I inform you of the following matters with regard to oral argument in the above entitled cases.

On May 7, 1980 the court intends to afford the parties a maximum of two hours of oral argument in the above cases. The case of Industrial Welfare Commission v. Superior Court (S.F. 24123) will be called first.

In the Industrial Welfare Commission v. Superior Court proceeding, the court believes that it would be helpful if the parties directed the major portion of their oral argument to the following legal issues:

1. Did the IWC fail to conduct an investigation prior to the selection of the wage boards pursuant to Labor Code Section 1778 and, if so, would such failure require the invalidation of all wage orders?

2. Do the Statements as to Basis of the 1980 wage orders comply with the requirements of Labor Code Section 1777?

3. Is the IWC precluded from acting on any matter upon which the California Occupational Safety and Health Standards Board has jurisdiction to act?

4. Did the IWC fail to comply with the California Environmental Quality Act in adopting the 1980 wage orders?

5. Is the IWC precluded by federal or state labor relations statutes from regulating with respect to matters that are subject to collective bargaining?

In the *Hitchcock/Theatre Properties* matter, the court suggests that the parties limit their oral argument to the question of the appropriate disposition of the litigation in light of this court's decision in California Hotel and Motel Association v. Industrial Welfare Commission (1979) 25 Cal.3d 200.

In light of the numerous issues involved in the *IWC* case, and the limited nature of the issue in *Hitchcock*, the court will permit the parties to agree among themselves as to the allocation of the two-hour time period between the *IWC* and *Hitchcock* cases. Counsel shall inform the court as to the agreed-upon allocation on or before May 2, 1980.

Petitioners' reply to the return in Industrial Welfare Commission v. Superior Court (S.F. 24123) shall be served and filed on or before April 23, 1980.

Very truly yours,

/s/ J. L. KAVANAGH,

J. L. Kavanagh,

Chief Deputy

JLK:ct

Enclosure

cc: Rec.

Reg.

L.A.

Cal.

APPENDIX G.

SUPPLEMENTAL RETURN OF REAL PARTIES IN INTEREST RESPONDING TO THE COURT'S INQUIRY ON LABOR LAW PREEMPTION AND REPLYING TO PETITIONER'S SUPPLEMENTAL REPLICATION.

I.

Introduction.

In its letter of April 21, 1980, the Court asked five questions which it wishes the parties to address in oral argument.* The fifth question is:

> "Is the IWC precluded by federal or state labor relations statutes from regulating with respect to matters that are subject to collective bargaining?"

The answer is clearly "yes." We are puzzled, however, by the fact that the Court has raised the question, because federal labor law preemption was not pleaded in any of the cases below and none of the parties has raised the issue of federal preemption in the present case. The major difficulty with addressing it at this point in these proceedings is that no factual record has been developed. To the extent that the Court wishes to rule upon these issues in the present case, it will be doing so in a vacuum.**

---

*The IWC has filed a written response. We hereby do likewise.

**The Real Parties in Interest hereby object to the Court's taking up this issue on the ground that it deprives them of their right to due process, in that it denies them the right to a hearing and the orderly development and presentation of evidence.

APPENDIX H.

[Letterhead]

May 8, 1980

HAND DELIVER

The Honorable Mathew O. Tobriner
Acting Chief Justice
And All Justices of the
California Supreme Court
4050 State Building
350 McAllister Street
San Francisco, CA 94102

Re: Industrial Welfare Commission vs. Superior Court, No. S.F. 24123.

Honorable Justices:

The purpose of this letter is to reiterate a point which may not have been fully understood by the Court during oral argument on May 7, 1980. It is this:

The real parties in interest intentionally refrained from presenting argument on the question of federal labor law preemption, which was one of the questions the Court had indicated in its letter of April 21, 1980, that it wanted addressed. The issue was neither pleaded nor raised by any of the parties in any of the trial court proceedings, nor was it raised by any of the parties before this Court. Accordingly, the issue was not properly before the Court and we respectfully submit that the Court has no jurisdiction to hear or decide it. The Court will recall that the real parties in interest stated this objection in their supplemental brief responding to the Court's question on federal preemption.

On other aspects of the case, we point out again that because of the way the case came before the Court, it was necessary to file briefs virtually on the eve of oral argument.

It is possible that the Justices may not have had the opportunity fully to consider all briefs before oral argument. We are particularly anxious that the Court should read and consider the arguments contained in the buff colored brief filed on May 2, 1980, by the real parties in interest, because we are confident that it contains the answers to the many knotty questions raised by the Justices during oral argument.

Respectfully submitted,

BROBECK, PHLEGER &
HARRISON,

By /s/ Jean C. Gaskill,
Jean C. Gaskill

On behalf of all real
parties in interest.

JCG:kmb

cc: All Counsel
Randall P. Borcherding, Esq.

Supreme Court, U. S.
FILED
NOV 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-552

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CALIFORNIA MANUFACTURERS ASSOCIATION, et al.,

Appellants,

v.

INDUSTRIAL WELFARE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, ET SEQ. AND THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ. PREEMPT THE CALIFORNIA INDUSTRIAL WELFARE COMMISSION'S ORDERS 1-80, 3-80, 4-80, 8-80, 9-80, AND 10-80?

II. WHETHER THE CALIFORNIA SUPREME COURT DENIED APPELLANTS PROCEDURAL DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT EXERCISED ITS ORIGINAL JURISDICTION TO REVIEW THE ORDERS OF THE CALIFORNIA INDUSTRIAL WELFARE COMMISSION (A QUASI-LEGISLATIVE STATE AGENCY) BASED UPON THAT AGENCY'S COMPLETE QUASI-LEGISLATIVE RECORD, AS WELL AS OTHER EVIDENCE AND PLEADINGS PRESENTED TO THE COURT, BUT WITHOUT THE COURT'S CONDUCTING A *DE NOVO* EVIDENTIARY HEARING?

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No. 80-552

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CALIFORNIA MANUFACTURERS ASSOCIATION, et al.,

Appellants,

v.

INDUSTRIAL WELFARE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

The appellees, Industrial Welfare Commission and the Division of Labor Standards Enforcement of the State of California, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of California on the ground that it is manifest that the questions presented by appellants, on which their appeal depends, are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

The Industrial Welfare Commission (hereafter referred to as the IWC or as the Commission) is a quasi-legislative agency of the State of California with the statutory (Lab. Code, §§ 70–74, 1171–1204) and constitutional (Cal. Const., Art. XIV, § 1) mandate to determine and set, by order, the minimum wages, maximum hours, and minimum working conditions for over 8,000,000 employees in 15 industries or occupational groups in California.

Appellants are employers and employer associations which are subject to the IWC orders 1-80, 3-80, 4-80, 8-80, 9-80, and 10-80. The six IWC orders in question are those which were adopted by the Commission in September 1979 and which were effective on January 1, 1980.

In mid-December 1979 the appellants filed actions in two California Superior Courts seeking to invalidate and stay the enforcement of the IWC orders applicable to them. Temporary stays of the enforcement of the orders were issued at the trial court level. Upon the petition of the IWC in February 1980 the California Supreme Court exercised its original jurisdiction on April 1, 1980, to resolve the legal challenges to the IWC's 1980 orders.[1] The California Supreme Court stayed the trial court proceedings and granted a hearing.

---

[1] The California Supreme Court noted in exercising its original jurisdiction that the suits filed in 1979 were repetitious of the 1976 litigation and indicative of the "tortuous litigation history which had prevented the implementation of the majority of IWC wage orders in recent years. . . ." (*Industrial Welfare Com.* v. *Superior Court* (1980) 27 Cal.3d 690, 699.)

On April 9, 1980, the IWC transmitted the administrative record of its entire quasi-legislative process of consideration and adoption of its 1980 orders to the California Supreme Court. The administrative record, consisting of over 25,000 pages of investigative material, reports, hearing transcripts, meeting transcripts, petitions, and other documents, was also provided to the appellants.

On or about April 14, 1980, appellants filed with the California Supreme Court a complete appendix consisting of all the pleadings filed in each of the trial courts, including voluminous declarations under penalty of perjury of members of the various employer associations or the employer representatives concerning the issues raised.

After the California Supreme Court had received briefs from the parties on all issues, the Court heard extended oral argument on May 7, 1980. On July 10, 1980, the California Supreme Court issued its unanimous decision upholding the IWC orders against all legal challenges. The California Supreme Court's decision directed the trial courts to dissolve the stays of the IWC orders and enter judgment for the IWC.

The California Supreme Court subsequently denied the applications of appellants for a stay of enforcement of the IWC orders. On October 20, 1980, this Court denied appellants' application (A-253) for a stay of enforcement of the IWC orders applicable to them.

ARGUMENT [2]

[2] For a more comprehensive exposition of appellees' Argument see pages 1–31 of Respondents' Memorandum of Opposition to Applications For Stays of Peremptory Writ of Mandate of the Supreme Court of the State of California and, in the Alternative, for an Order Maintaining the Status Quo on Appeal and/or Pending Review on Certiorari, United States Supreme Court Nos. A-253 and A-254, filed September 24, 1980.

THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY RESOLVED BY DECISIONS OF THIS COURT

1. Neither the National Labor Relations Act Nor the Railway Labor Act Preempts the Regulation by the California Industrial Welfare Commission Orders.

Collective bargaining pursuant to the National Labor Relations Act (NLRA) or the Railway Labor Act (RLA) has not preempted California regulation providing for the establishment of a minimum wage, maximum hours, and minimum working conditions.

Federal courts have uniformly held that federal preemption should not be presumed absent a clear manifestation of an intent by Congress to preempt. (*Associated Gen. Contractors of Mass., Inc.* v. *Altshuler* (1st Cir. 1973) 490 F.2d 9, 15; *Double-Eagle Lubricants, Inc.* v. *State of Texas* (N.D. Tex. 1965) 248 F.Supp. 515, 517.) There is no such express statement of intent in either the NLRA or the RLA as to state regulation such as that performed by the IWC.

These principles were confirmed by the California Supreme Court in *Industrial Welfare Com.* v. *Superior Court,* (1980) 27 Cal.3d 690, 729 in which the court concluded that "existing federal and state labor statutes establish no bar to the IWC's promulgation of the 1980 wage orders [citations]." In *California Manufacturers Assn.* v. *Industrial Welfare Com.* (1980) 109 Cal.App.3d 95 the Court of Appeal in discussing the NLRA and federal labor policy also confirmed that by stating:

"There is no attempt in these [1976 IWC] orders to

regulate organizational activities of employees or of employer-employee collective bargaining activities . . . [T]here is nothing in the . . . [NLRA] . . . to suggest that it was intended to divest the states of authority to set minimum working condition requirements. . . . It is clear that the regulation contained in the orders which are the subject of this lawsuit are within the scope of permissible state regulation. . . . We conclude that these orders are not automatically preempted by the existence of any of the federal laws or regulations cited." (*Id.,* at 119, 121.)

a. *The National Labor Relations Act.*

There is absolutely no language in the NLRA to suggest that the authority to join a labor union and to engage in collective bargaining should divest the states of authority to set *basic minimum* working condition requirements.

The issue of federal preemption in the labor law context has been considered by the United States Supreme Court in the case of *Farmer* v. *Carpenters* (1977) 430 U.S. 290. In *Farmer* this Court observed that while preemption does occur when the state regulates union activities or unfair labor practices, preemption does not result merely because of the existence of the NLRA.

". . . We have refused to apply the preemption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not

infer that Congress had deprived the States of the power to act.' [Citation.]" (*Id.,* at 296–297.)

The California courts and the United States Supreme Court have long recognized that even though state regulation, designed to protect the interests and welfare of its citizens, may have an impact on federal labor law or interstate commerce, such impact does not invalidate state regulation. (Cf. *Bibb* v. *Navajo Freight Lines* (1959) 359 U.S. 520; *Mintz* v. *Baldwin* (1933) 289 U.S. 346; *Huron Cement Co.* v. *Detroit* (1960) 362 U.S. 440; *Head* v. *New Mexico Board* (1963) 374 U.S. 424.)

Deference to the federal *mechanism* for protecting collective bargaining and other concerted activities, or prohibiting unfair labor practices, under the preemption doctrine does not oust the IWC of its regulatory authority.

The clearest and most comprehensive analysis of the preemption issue in a setting similar to that which is presently under consideration is found in *Malone* v. *White Motor Corp.* (1978) 435 U.S. 497. The United States Supreme Court in *Malone* in analyzing Minnesota pension regulations and their effect on the Employee Retirement Income Security Act determined that local regulation which touches the interrelationships between employers, employees, and unions is not necessarily preempted. (*Id.,* at 504.) The United States Supreme Court acknowledged the fact that collective bargaining under federal statutes includes wages, hours, and working conditions and that pension benefits are proper subjects of collective bargaining. (*Id.,* at 504.)

With this in mind, the court in *Malone* concluded that the NLRA did not expressly or impliedly preempt local pension regulation.

> ". . . there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the Pension Act is pre-empted here, the congressional intent to do so must be *implied* from the relevant provision of the labor statutes. We have concluded, however, that such implication should not be made here. . . ." (*Id.,* 435 U.S. 497 at 504–505.)

And when faced with the question of how the pension regulation affected existing collective bargaining agreements the court responded:

> "Insofar as the Supremacy Clause issue is concerned, no different conclusion is called for because the Minnesota statute was enacted after the UAW-White Motor company agreement had been in effect for several years. Appellee points out that the parties to the 1971 collective-bargaining agreement therefore had no opportunity to consider the impact of any such legislation. Although we understand the equitable considerations which underlie appellee's argument, they are not material to the resolution of the pre-emption issue since they do not render the Minnesota Pension Act any more or less consistent with congressional policy at the time it was adopted. . . ." (*Id.,* 435 U.S. 497 at 514.) (Emphasis added.)

The *Malone* v. *White Motor Corp.* decision and the other authorities cited, make it clear that the IWC has the authority to promulgate and enforce the challenged

orders without any preemption by the NLRA. Federal preemption cannot be *implied* where there is in fact no express congressional intent or public policy to support preemption.

b. *The Railway Labor Act.*

The Railway Labor Act does not preempt state regulation of wages, hours, and working conditions. There is no express or implied congressional intent to preempt. This was made very clear almost 40 years ago in *Terminal Assn.* v. *Trainmen* (1943) 318 U.S. 1, at 6–7 where the United States Supreme Court stated:

> "*The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions.* Instead it seeks to provide a means by which agreement may be reached with respect to them. *The national interest expressed by those Acts is not primarily in the working conditions as such.* . . . The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . . *We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field regulating working conditions themselves and did not preclude the State . . . from making the order in question.*" (Emphasis added.)

The orders of the IWC are only of peripheral concern to the federal bargaining law, are deeply rooted in local feeling and responsibility, and are the kind of orders that the courts have historically held to be outside of the preemption doctrine. (See *Sears, Roebuck & Co.* v. *Car-*

penters (1978) 436 U.S. 180, 188–189, fns. 12 and 13; *Farmer* v. *Carpenters, supra,* 430 U.S. 290, 295–297; *Vaca* v. *Sipes* (1967) 386 U.S. 171.) As we have maintained, the IWC's regulations are similar to workers' compensation and unemployment insurance which no one asserts have been preempted by collective bargaining agreements. (*Super Tire Engineering Co.* v. *McCorkle* (1974) 416 U.S. 115; on remand (3d Cir. 1977) 550 F.2d 903; *New York Telephone Co.* v. *New York State Department of Labor* (1979) 440 U.S. 519.)

As is clear from the discussion and authorities immediately above, the RLA does *not* preempt the state regulation of wages, hours, and working conditions.[3]

Appellants contend that the decision of the California Supreme Court in *Industrial Welfare Com.* v. *Superior Court, supra,* 27 Cal.3d 690, is in conflict with *Railway Employees' Dept.* v. *Hanson* (1956) 351 U.S. 225 and *California* v. *Taylor* (1957) 353 U.S. 553. To the contrary, the decision of the California Supreme Court is in accord with the decisions of this Court in *Hanson* and *Taylor.* Appellants do not point to any conflict between the IWC orders and federal labor law as required in *Hanson* and the RLA contains no expression of congressional intent to preempt the IWC orders as required by *Taylor.* Furthermore, neither *Hanson* nor *Taylor* is a case dealing with state regulation prescribing a minimum standard

[3] Over and above the legal authority for permissible state regulations, IWC order 9-80 (covering the transportation industry) has an express exemption for employees covered by collective bargaining agreements under the RLA.

for working conditions to protect health, safety, or welfare of employees but instead deal with direct interference with the collective bargaining *process* in conflict with expressed congressional intent.

The authorities for upholding regulation by the IWC in the areas of wages, hours and working conditions are clear and convincing. Appellants have in all respects failed to show that the IWC's orders are preempted in whole or in part by the NLRA or the RLA.

2. Appellants' Due Process Claim has no Merit; Judicial Review, Including That of the Preemption Issue, was Properly Based Upon the Record Before the California Supreme Court.

The appellants in this action contend that they have been denied due process of law under the Fourteenth Amendment. That denial is alleged to have occurred when the California Supreme Court in April 1980 agreed to review the legal validity of the Commission's challenged 1980 orders, that should have been fully enforceable on January 1, 1980. Appellants' assert that a *de novo* judicial evidentiary hearing is a *sine qua non* of the judicial review of the regulations of a state quasi-legislative agency. Such an assertion not only seriously misconstrues the scope of judicial review of regulations but also intentionally omits reference to the existence of the Commission's 25,000-page administrative record, which the California Supreme Court had before it during its judicial review of the 1980 orders. (The table of contents for the administrative record and the accompanying transmittal letter to the California Supreme Court is

attached as exhibit A to respondents' opposition to applications for stays (A-253, A-254).)

At issue before the California Supreme Court was the legal validity of Commission regulations, known as "wage orders," which constitute quasi-legislative action, authority for which is derived from the California Constitution. (Cal Const., Art. XIV, § 1.) These regulations set minimum wages, maximum hours and minimum working conditions for the general welfare of California employees.

a. *Scope of Judicial Review.*

The scope of judicial review of administrative regulations has been succinctly stated as follows:

> "California decisions on judicial review of administrative regulations reveal three kinds of inquiry: first, whether the agency has statutory authority to adopt a regulation of the kind under scrutiny; second, whether the action is arbitrary or entirely lacking in evidentiary support; third, whether the agency has complied with statutory procedures. The agency's action comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant." (*California Assn. of Nursing Homes etc., Inc.* v. *Williams* (1970) 4 Cal.App.3d 800, 810.)

A reviewing court's function is indeed a limited one when its purpose, as it is here, is to review the operation of a coordinate and co-equal branch of government. As stated in the *California Optometric Assn.* case in discussing the California Administrative Procedure Act, which is one statutory set of criteria for regulation adoption in

California, similar to that of the Labor Code which pertains to the Commission:

> "One objective of the APA is assurance of meaningful *public participation* in the adoption of administrative regulations by state agencies; another is creation of an *administrative record* assuring effective judicial review." (*California Optometric Assn.* v. *Lackner* (1976) 60 Cal.App.3d 500, 506; emphasis added.)

b. *Record Under Review.*

The Commission's 1980 wage orders in addition to its 25,000-page administrative record came to the California Supreme Court with the benefit of statements as to the basis, which serve to require the agency itself, rather than the courts, to engage in the evidentiary review process. The statement as to the basis is described as follows:

> "The statement should reflect the factual, legal, and policy foundations for the action taken. The statement of basis must show that the order adopted is reasonably supported by the material gathered by or presented to the commission—through its own investigations, the wage board proceedings, and the public hearings—and is reasonably related to the purposes of the enabling statute." (*California Hotel & Motel Assn.* v. *Industrial Welfare Com.* (1979) 25 Cal.3d 200, 213.)

One of the purposes of the statement as to the basis, as described above, is to facilitate judicial review. (*Id.,* at 211.)

Thus, appellants' assertions concerning due process

and evidentiary hearings in the 1980 litigation seriously misstate the nature of what the California Supreme Court properly had before it for review. The California Supreme Court had reviewed a record consisting of more than 25,000 pages of administrative documentation and public hearing transcripts, the California Constitution and Labor Code, the 1980 wage orders, which included the statements as to the basis, the pleadings and declarations filed in the four California trial courts, and a chronological collection of all challenged IWC orders, some of which date back to 1916. The appellants were free at any time to point out to the California Supreme Court where support for their evidentiary assertions could be found in the record or in their previously filed trial court pleadings and declarations. Their unwillingness or inability to make such references to the evidentiary record demonstrates the weakness of their position that there was some added evidence that the California Supreme Court should have considered.

The purpose of the Commission's extensive administrative hearing process (which included a wage board for each industry or occupation and eight days of public hearings to revise regulations, some of which have been in existence for more than 50 years) is to allow interested parties to present their position to the Commission. In the instant case the appellants were involved in the promulgation process either because they participated on wage boards, submitted written statements of position, or make oral argument before the Commission. There has been no challenge by appellants to the due process accorded them by the Commission. It is during this extensive administrative review and adoption process that one must look for, and will find, due process.

c. *Due Process was Accorded Appellants.*

Due process is the right to notice and an opportunity to be heard "granted at a meaningful time and in a meaningful manner." (*Armstrong* v. *Manzo* (1965) 380 U.S. 545, 552.) Due process is flexible and allows variances in the form of a hearing appropriate to the nature of the case. (*Morrissey* v. *Brewer* (1972) 408 U.S. 471, 481; *Cafeteria Workers* v. *McElroy* (1961) 367 U.S. 886, 895; *Mullane* v. *Central Hanover Trust Co.* (1950) 339 U.S. 306, 313.) Specifically in regard to the Commission's regulations it has been said that "[o]rderly judicial review may be had without taking new evidence." (*Rivera* v. *Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 581.)

Here appellants had full opportunity to present their evidence to the Commission. In the context of the quasi-legislative process, that is the subject of review herein, it is during the administrative hearing process itself that an affected party should present its views. It is clear that the quasi-legislative process accorded appellants' due process. Further, the California Supreme Court authorized the filing of appellants' trial court pleadings and declarations, which had served as the basis for the trial courts' actions delaying in whole or in part enforcement of the challenged orders.[4] Finally, the California Su-

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[4] Appellants consciously chose to omit the preemption issue from their trial court action, stating as follows:

> "Petitioners did not raise the federal preemption issue in the state courts because, conceiving it to be purely a federal issue, they had decided to reserve it for determination in a collateral suit which they intend to file in the United States District Court." (Calif. Manuf. Assn., Juris. Statement, p. 3, fn. 2.)

Both federal and state courts disapprove of such selective resolution of issues. (*Dominguez Land Corp.* v. *Daugherty* (1925) 196 Cal. 468; *Baird* v. *United States* (1877) 96 U.S. 430.)

preme Court identified the issues to be addressed and provided both a briefing schedule and opportunity for oral argument.[5] Appellants participated in all parts of these administrative and judicial processes. They were given a reasonable time and place to present their views. They were accorded full due process.

Appellees' substantive discussion of the preemption issue, *supra,* makes it clear that the California Supreme Court properly decided the question as a matter of law. What needs to be examined in the preemption context is whether the Commission's orders have been preempted by the federal labor laws which provide a mechanism for collective bargaining. The Commission's orders themselves can be examined for an answer to that question. The Commission's orders establish a minimum wage, set maximum hours of work, and minimum working condition provisions. These minimum conditions apply to each industry or occupation, with special consideration being given in some cases to the unique needs of a particular industry or occupation. The Commission's orders do not regulate the collective bargaining process. As stated in *California Manufacturers Assn.* v. *Industrial Welfare Com., supra,* 109 Cal.App.3d 95, 118: "There is no attempt in these orders to regulate organizational activities of employees or of employer-

[5] Appellants submitted briefs on the preemption issue. Furthermore, the preemption issue was decided by the California Court of Appeal, Fourth Appellate District, in the 1976 antecedent to the current litigation. From reading that decision it is apparent that the preemption issue can be, and was properly, decided as an issue of law. (See *California Manufacturers Assn.* v. *Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 118–121.)

employee collective bargaining activities."

The conflict, alleged by appellants, between the Commission's orders and collective bargaining agreements, does not support the implication of an intent by Congress to oust the states from an area of regulation so necessary to the welfare of California employees. There has been no showing made by appellants that the existence of an actual conflict, which is all their evidence would go to show, is dispositive of the preemption issue. In fact, the preemption issue can be, and was properly, decided on an analysis of the orders themselves as they relate to federal labor policy. That analysis failed to disclose preemption. There was no due process denial in reaching that decision.

CONCLUSION

For the foregoing reasons appellees submit that the questions upon which this appeal depends are so insubstantial as not to need further argument. Appellees, therefore, move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered by the California Supreme Court.

Respectfully submitted,

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